Supreme Court, U.S.
FILED

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

PROGRESS RAIL SERVICES CORPORATION and
RAILCAR, LTD.,
Petitioners,
v.
ALLFIRST BANK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should the Eleventh Circuit Court of Appeals issue a writ of mandamus directing the United States District Court for the Northern District of Georgia, Atlanta Division (the "district court"), to take all reasonable steps to promptly retrieve the case files from the United States District Court for the District of Maryland, to enable the Eleventh Circuit to reacquire its appellate jurisdiction of the case and to review the district court's order, where the district court has (i) denied the petitioners' motion for remand to state court without deciding the issues raised in the motion and without allowing the petitioners to file a reply to the respondent's response to the motion as was petitioners' right under the local rules, (ii) ordered the case transferred to a district court outside of the appellate court's circuit, and (iii) transferred the case files on the same day that it entered the transfer order, thereby depriving the petitioners of their rights to seek reconsideration or appellate review in the same circuit?

2. May the Eleventh Circuit review the district court's order regardless of whether it recovers the physical case files?

3. Should the district court have remanded the case to the state court?

4. Did the district court improperly shift the burden of proof and persuasion to the petitioners and clearly abuse its discretion by transferring the case to a district court in Maryland?

PARTIES TO THE PROCEEDING

There are no parties in addition to those named in the caption to the case.

CORPORATE DISCLOSURE STATEMENT

Progress Fuels Corporation (f/k/a Electric Fuels Corporation)

Progress Capital Holdings, Inc.

Florida Progress Corporation, and Progress Energy, Inc.

Progress Rail Services Corporation is the parent company of Railcar, Ltd.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding and Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Citations of Reports of Orders and Opinions Below	1
Statement of Jurisdiction	1
Statute Involved	2
Statement of the Case	2
Reasons for Granting the Writ	6
Conclusion	29

Appendices:

Order and opinion of U.S. Court of Appeals for the Eleventh Circuit	A-1
Order and opinion of U.S. District Court for the Northern District of Georgia, Atlanta Division, entered on October 2, 2001	B-1
Order and opinion of U.S. District Court for the Northern District of Georgia, Atlanta Division, entered on January 7, 2002	C-1

TABLE OF AUTHORITIES

Statutes	Page
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1292(b)	3, 14
28 U.S.C. § 1294	28
28 U.S.C. § 1404(a)	2, 3, 8, 9, 12, 18, 25, 27
28 U.S.C. § 1406(a)	12
O.C.G.A. § 14-2-1501	14, 15, 17
O.C.G.A. § 14-2-1502	15

Cases

A. Olinick & Sons v. Dempster Brothers, Inc., 365 F.2d 439 (2d Cir. 1966)	19
Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33 (1980)	18
Autoridad de Energia Electrica de P.R. v. Ericsson, Inc., 201 F.3d 15 (1st Cir. 2000)	25
Bankers Life & Casualty Co. v. Holland, 346 U.S. 379 (1953)	12
In re Chatman-Bey, 718 F.2d 484 (D.C. Cir. 1983)	18

Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509 (10th Cir. 1991) 10, 11

Citro Fla., Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985) 24

Colo. v. Symes, 286 U.S. 510 (1932) 13

Commonwealth of Pa. v. Newcomer, 618 F.2d 246 (3d Cir. 1980) 13

Elect. Transaction Network v. Katz, 734 F. Supp. 492 (N.D. Ga. 1989) 26

Fine v. McGuire, 433 F.2d 499 (D.C. Cir. 1970) 10, 11, 12, 17, 18

Golconda Mining Corp. v. Herlands, 365 F.2d 856 (2d Cir. 1966) 18

Grey v. Cont'l Mktg. Assocs., Inc., 315 F. Supp. 826 (N.D. Ga. 1970) 26

Keaty v. Freeport Indon., Inc., 503 F.2d 955 (5th Cir. 1974) 25

Kinetic Concepts, Inc. v. Kinetic Concepts, Inc., 601 F. Supp. 496 (N.D. Ga. 1985) 17

La Buy v. Howes Leather Company, 352 U.S. 249 (1957) 9

Md. v. Soper (No. 1), 270 U.S. 9 (1926) 13

Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248 (11th Cir. 1988) 14

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169 (11th Cir. 1982) 19

Morgan Guar. Trust Co. of N.Y. v. Blum, 649 F.2d 342 (5th Cir. Unit B 1981) 14

NBS Imaging Sys. v. United States Dist. Court for the Eastern Dist. of Cal., 841 F.2d 297 (9th Cir. 1988) 11

In re Nine Mile Ltd., 673 F.2d 242 (8th Cir. 1982) 10, 11

Peridyne Tech. Solutions, LLC v. Matheson Fast Freight, Inc., 117 F. Supp.2d 1366 (N.D. Ga. 2000) 22

Plum Tree, Inc. v. Stockment, 488 F.2d 754 (3d Cir. 1973) 25, 26, 27

Poirrier v. Nicklos Drilling Co., 14
648 F.2d 1063 (5th Cir. Unit A 1981)

R. N. Kelly Cotton Merch., Inc. v. York, 17
379 F. Supp. 1075 (M.D. Ga. 1973)

In re Ralston Purina Co., 19
726 F.2d 1002 (4th Cir. 1984)

Roche v. Evaporated Milk Ass'n, 9, 13
319 U.S. 21 (1943)

Roofing & Sheet Metal Svcs., Inc. 3, 4, 10, 12, 18
v. La Quinta Motor Inns, Inc.,
689 F.2d 982 (11th Cir. 1982)

S & H Contractors, Inc. v. A. J. Taft 15
Coal Co. Inc., 906 F.2d 1507
(11th Cir. 1990), cert. denied,
498 U.S. 1026 (1991)

SAR Mfg. Co. v. Dumas Bros. Mfg. Co. Inc., 15
526 F.2d 1283 (5th Cir. 1976)

In re Scott, 709 F.2d 717 (D.C. Cir. 1983) 18

Snapper, Inc. v. Redan, 24
171 F.3d 1249 (11th Cir. 1999)

Starnes v. McGuire, 10, 11
512 F.2d 918 (D.C. Cir. 1974)

Technitrol, Inc. v. McManus, 10, 11
405 F.2d 84 (8th Cir. 1968),
cert. denied, 394 U.S. 997 (1969)

Toro Co. v. Alsop, 565 F.2d 998 (8th Cir. 1977) 19

Transp. Ins. Co. v. El Chico Rests., Inc., 15
271 Ga. 774, 524 S.E.2d. 486 (1999)

Ukiah Adventist Hosp. v. F.T.C., 18
981 F.2d 543 (D.C. Cir. 1992)

In re Warrick, 70 F.3d 736 (2d Cir. 1995) 11

Winston Corp. v. Park Elec. Co.,
126 Ga. App. 489, 191 S.E.2d 340 (1972) 17

Other

15 C. Wright, A. Miller & E. Cooper, Federal
Practice and Procedure § 3846 28

15 C. Wright, A. Miller & E. Cooper,
Federal Practice and Procedure § 3855 18

Stowell R.R. Kelner, Note, "Adrift on an Uncharted Sea:" A Survey of Section 1404(a) Transfer in the Federal System, 67 N.Y.U. L. Rev. 612 (1992) 8

Richard L. Marcus, Conflicts among Circuits and Transfers within the Federal Judicial System, 93 Yale L.J. 677 (1984) 8

Robert A. Ragazzo, Transfer and Choice of Federal Law: The Appellate Model, 93 Mich. L. Rev. 703 (1995) 8

Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595 (1987) 8

CITATIONS OF REPORTS OF ORDERS AND OPINIONS BELOW

The order and opinion of the United States Court of Appeals for the Eleventh Circuit (Edmondson and Wilson, Circuit Judges) entered on December 31, 2001, has not been reported and is set forth in the appendix beginning at page A-1.

The order and opinion of the United States District Court for the Northern District of Georgia, Atlanta Division (Thrash, J.), entered on October 2, 2001, has not been reported and is set forth in the appendix beginning at page B-1.

The order and opinion of the United States District Court for the Northern District of Georgia, Atlanta Division (Thrash, J.), entered on January 7, 2002, has not been reported and is set forth in the appendix beginning at page C-1.

STATEMENT OF JURISDICTION

The order and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on December 31, 2001. (App. A) This petition is filed timely and within 90 days of the denial by the Eleventh Circuit of the petition for writ of mandamus.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

Procedural History. Petitioners, Progress Rail Services Corporation ("Progress") and Railcar, Ltd. ("Railcar"), filed this case on August 1, 2001, in the Superior Court of Fulton County, Georgia. Respondent, Allfirst Bank ("Allfirst") removed this case from state court to the United States District Court for the Northern District of Georgia, Atlanta Division ("Atlanta District Court"), on August 24, 2001, on the basis of diversity of citizenship. On August 28, 2001, respondent moved the Atlanta District Court to dismiss this case or, in the alternative, to transfer the case to the United States District Court for the District of Maryland ("Maryland District Court"), pursuant to 28 U.S.C. §1404(a). In response, on September 20, 2001, petitioners filed (i) an opposition to respondent's motion for dismissal or transfer, and (ii) a motion to remand the case to the state court, on the ground that, inter alia, respondent's failure to obtain a certificate of authority to do business in Georgia barred respondent from seeking to remove the action to federal court.

On October 2, 2001, the Atlanta District Court entered an order (the "Order") in which it, inter alia,

(i) denied petitioners' motion to remand the case to state court, without deciding any of the issues presented by that motion and without permitting petitioners to file a reply to respondent's response to that motion as was petitioners' right under the local rules, and (ii) ordered the case transferred to the Maryland District Court pursuant to 28 U.S.C. § 1404(a).

The Atlanta District Court transferred the case records on the same day that it entered the Order, without allowing petitioners to seek review in the circuit in which the Atlanta District Court sits (the Eleventh Circuit).

Petitioners petitioned the Eleventh Circuit Court of Appeals for a writ of mandamus directing the Atlanta District Court and its clerk to take all reasonable steps to promptly retrieve the files from the transferee court. Petitioners also moved the Atlanta District Court to certify the Order pursuant to 28 U.S.C. §1292(b) for review by the Eleventh Circuit or, in the alternative, to vacate the Order.

On January 7, 2002, the Atlanta District Court denied petitioners' motion for certification on the ground that it no longer had jurisdiction of the case.

On December 31, 2001, the Eleventh Circuit denied petitioners' petition for a writ of mandamus and suggested that petitioners seek a retransfer from the Maryland District Court and, if still aggrieved, file an appeal with the Court of Appeals for the Fourth Circuit. The Eleventh Circuit's opinion cites

only Roofing & Sheet Metal Svcs., Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982 (11th Cir. 1982), which held that the Eleventh Circuit lacked jurisdiction to review a transfer order of a district court embraced by another circuit. That holding does not speak to the question whether the Eleventh Circuit can review a transfer decision (the Order) by a district court in its own circuit. Indeed, in Roofing, the Eleventh Circuit stated that a proper course is to seek mandamus from the court of appeals for the transferor circuit, as petitioners have done here.

Petitioners have done as the Eleventh Circuit suggested to them: On or about November 9, 2001, Petitioners filed a motion with the Maryland District Court seeking to have that court transfer this case back to the Atlanta District Court. On December 27, 2001, the Maryland District Court entered an order denying that motion on the grounds that, inter alia, the Atlanta District Court's decision governs as the law of the case and that the Maryland District Court will not act as an "appellate court" and review that decision.[1]

Since the Fourth Circuit cannot review a decision of the Atlanta District Court, it is now clear that, unless the Eleventh Circuit issues the requested writ of mandamus (or otherwise exercises its appellate jurisdiction) or this Court itself reviews the Order, no court will substantively review the

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[1] The Maryland District Court also suggested that petitioners could have prevented the hasty transfer of the case files by requesting a stay. Yet such a request made recently in another case did not prevent a similar hasty transfer by a judge in the same Atlanta district.

Atlanta District Court's Order.

Nature of the Dispute. This case arose out of certain transactions that petitioners and respondent entered into pursuant to an Assignment Agreement, a related Service Agreement, and a First Loss Deficiency Guaranty ("FLDG"), all dated November 30, 1998 (collectively, the "Agreements"), involving, inter alia, the purchase by respondent from petitioners of 996 railroad cars together with the leases to which the cars were subject. Allfirst became the owner of the cars and the lessor under the leases. Pursuant to the Service Agreement, with respect to each group of cars, Progress agreed to perform certain maintenance and other services for the term of the existing lease. Pursuant to the FLDG, Progress agreed to provide a limited guarantee of the economics of the cars and leases. Progress's cumulative liability under the FLDG is limited to $1,264,167 (subject to adjustment as provided in the FLDG), which represents 9.995% of Allfirst's total purchase price for all of the cars.

The focus of the dispute is the Service Agreement (which has no forum selection clause), and particularly whether Progress has satisfied its obligations under that agreement as to certain coal cars. Allfirst contends that pursuant to the Service Agreement, not the FLDG, after the lease of these cars expired, Progress was required (i) to continue to maintain the cars to meet the hypothetical specifications of a nonexistent lessee, and to do this in a severely depressed market, (ii) to pay Allfirst the target minimum rentals, and (iii) when the cars were sold, to pay Allfirst the amount by which the sales proceeds were less than Allfirst's target sales price

("Stipulated Loss Value"). Progress/Railcar contend that (i) Progress's obligation under the Service Agreement to maintain the cars ended when the cars were returned by the lessee at the expiration of the lease, (ii) it is contrary to the spirit and the express language of the Service Agreement to transmute a repair obligation into a payment guarantee (and thereby sidestep the agreed limitations on liability set forth in the FLDG), and (iii) any obligations to pay target minimum rentals and Stipulated Loss Value shortfalls arose only under the FLDG, not the Service Agreement, and the payments of such amounts made to date by Progress exceed the limit of Progress's liability under the FLDG (as to which excess Progress seeks a refund). Allfirst also alleges nonperformance of obligations under the Assignment Agreement (which, like the Service Agreement, has no forum selection clause). The FLDG between Progress and respondent has a forum-selection clause that permits respondent to bring suit in a federal or state court in Maryland, but does not require that any suit between them be brought in such courts and does not restrict Progress from suing elsewhere.

REASONS FOR GRANTING THE WRIT

1. Importance of the Question. This Court should grant the writ of certiorari to settle an important question of federal law arising from inter-circuit transfers and a longstanding problem in the administration of the federal courts whereby a hasty transfer of case files creates a jurisdictional limbo in which the transfer order and related orders are unreviewable by any court.

Unless this Court makes clear that the appellate court for the circuit in which the transferor court sits should issue a writ of mandamus (or otherwise exercise its appellate jurisdiction) in a case such as this, district courts can continue to insulate their transfer orders and other orders from substantive review by transferring the case records before the party opposing the transfer has time to seek reconsideration or appellate review in the circuit in which the transferor court sits.

Under existing practice, neither the district court nor the appellate court for the transferee circuit will review the transferor court's action. Transferee district courts generally refuse to reconsider the transfer order by invoking an inflexible standard for the "law of the case" (as happened here). Appellate courts for the transferee circuit generally refuse to review the order on the ground that they cannot review a decision by a transferor district court sitting in another appellate circuit (as also is the case here). The only remaining recourse for the party opposing transfer is to move in the transferee district court for a retransfer, which does not afford the party comparable review, for on that motion the party bears the burden of proof and persuasion and no longer benefits from the rule that a case should be decided in the district where it was first filed. Accordingly, under existing practice, if the party opposing such a transfer is to obtain substantive review, it must have an opportunity to challenge the transfer order (and related orders) in the appellate court for the transferor court's circuit. Otherwise, even a transfer made in clear contravention of applicable law -- or for that matter,

one made for no reason other than to clear a busy docket -- cannot be reviewed.

To resolve the problem, this Court should instruct transferor-circuit appellate courts to exercise their authority where a district judge too hastily implements an order transferring a case out of that circuit. Alternatively, this Court could make it clear that in such a case, transferee courts should not automatically refuse to reconsider the transfer order by giving the order undue weight as the "law of the case." If this Court does not act, the courts of both circuits (transferor and transferee) will continue to leave such orders without substantive review.

Questions of appellate review where a case is transferred between circuits have generated an extraordinary volume of litigation for many years, and the law remains unsettled. See Joan Steinman, Law of the Case: A Judicial Puzzle in Consolidated and Transferred Cases and in Multidistrict Litigation, 135 U. Pa. L. Rev. 595 (1987), particularly at pp. 641-648; Stowell R.R. Kelner, Note, "Adrift on an Uncharted Sea:" A Survey of Section 1404(a) Transfer in the Federal System, 67 N.Y.U. L. Rev. 612 (1992); Robert A. Ragazzo, Transfer and Choice of Federal Law: The Appellate Model, 93 Mich. L. Rev. 703 (1995); Richard L. Marcus, Conflicts among Circuits and Transfers within the Federal Judicial System, 93 Yale L.J. 677 (1984). As Steinman (at p. 646) summed up the situation in 1987: "The consequence of all this seems a most unappealing one: that clear errors stand, untouchable." The time has come for resolution.

2. The Eleventh Circuit should issue the requested writ of mandamus to the Atlanta District Court.

The primary use of the writ of mandamus in aid of appellate jurisdiction "is to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943).

In a case such as this one, "[t]he focal question posed . . . is whether the action of the District Court tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law. The answer is clearly in the affirmative where, for example, the order of the District Court transfers a cause to a District Court of another circuit for decision." La Buy v. Howes Leather Company, 352 U.S. 249, 264 (1957) (Brennan, J. dissenting). In La Buy, the four dissenting Justices argued that review via mandamus was available when "the effect of the order is that the district judge has declined to proceed with the determination of a case which could eventually come to [the Court of Appeals] by appeal from a final decision." Id. (internal punctuation and citations omitted). The dissenters disapproved of the La Buy majority's going beyond this narrow use of mandamus to affirm the grant of a writ of mandamus prohibiting the district judge from referring the case to a master pursuant to Rule 53(b), Fed. R. Civ. P., in part because such an order does not deprive the Court of Appeals of its appellate jurisdiction. Id.

Here, the Atlanta District Court exceeded its lawful power when it transferred the case files on the same day that it entered the transfer order, thereby depriving petitioners of their right to seek reconsideration or appellate review in the circuit in which the Atlanta District Court sits. When a court grants a transfer pursuant to 28 U.S.C. §1404(a), it should stay or delay the physical transfer of files for a sufficient period to permit the party opposing transfer to seek judicial review in the circuit of origin of the case. See, e.g., Roofing & Sheet Metal Serv, Inc., v. La Quinta Motor Inns, Inc., 689 F.2d 982, 988-89 n.10 (11th Cir. 1982) ("the prevailing approach is to delay the physical transfer of the papers in a case long enough to allow an aggrieved party the opportunity to file a petition for mandamus"); Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1520 n.9 (10th Cir. 1991) ("the district court should have allowed the parties time to seek certification or file a mandamus petition before physically transferring the record. . . ."); In re Nine Mile Ltd., 673 F.2d 242, 242 (8th Cir. 1982) ("The petitioner correctly argues that in order to permit adequate and orderly review of one federal district court's decision to transfer a case to another federal district court, physical transfer of the file should be delayed for a period of time after entry of the transfer order so that review may be sought in the transferor circuit."); Starnes v. McGuire, 512 F.2d 918, 924, 935 (D.C. Cir. 1974) (en banc) ("[I]t is essential that procedures be adopted and observed that will [sic] provide plaintiffs a fair opportunity to seek review in the transfer circuit prior the physical transfer of the record."); Technitrol, Inc. v. McManus, 405 F.2d 84, 86 (8th Cir. 1968), cert. denied, 394 U.S. 997 (1969) ("the better procedure" is to "hold up

the transfer for a reasonable time pending possible petition for reconsideration or review."). See also Fine v. McGuire, 433 F.2d 499, 501 n.1 (D.C. Cir. 1970) (noting that Court of Appeals itself had successfully requested transferee district court outside of circuit to return file to transferor district court to permit Court of Appeals to consider mandamus petition seeking to vacate transfer order).

In Nine Mile, as in this case, the file was physically transferred on the same day that the transfer order was entered. The Eighth Circuit held, "we have no alternative but to grant the petition for a writ of mandamus," and "we direct the district court and the clerk for the Northern District of Iowa to take every reasonable action possible in asking the District of South Carolina to return the files." 673 F.2d at 244, 244 n.5. The Court further directed that all "future transfer orders be effectuated in accordance with the teachings of Starnes and Technitrol." Id. at 244. See also Chrysler Credit, 928 F.2d at 1521 n.13 ("Our only power would be to direct the Oklahoma court to request that the Michigan court retransfer the action.") (emphasis in original).

In sum, other Circuits have recognized that when a district court acts "hastily" in transferring the record, a diligent petitioner would be wrongfully precluded from seeking appellate review, including via mandamus, in the Circuit of origin. See In re Warrick, 70 F.3d 736, 740 (2d Cir. 1995); NBS Imaging Sys. v. United States Dist. Court for the Eastern Dist. of Cal., 841 F.2d 297, 298 (9th Cir. 1988). These Circuits recognize that a Court of Appeals' need to protect its own jurisdiction "justifies

the rule that when the transferred case has been docketed in the transferee court despite the petitioner's diligence, this court can 'order[ ] a district court in this circuit to request the transferee court to return the case.'" In re Warrick, 70 F.3d at 740 (relying on, inter alia, NRS Imaging Sys., 841 F.2d at 298; In re Nine Mile Ltd., 673 F.2d at 243-44; and Eine, 433 F.2d at 500 n.1).

The Eleventh Circuit itself has cited with approval to Nine Mile, which is factually indistinguishable from this case, suggesting that in this case the Eleventh Circuit should issue the requested writ of mandamus and direct the Atlanta District Court to ask the Maryland District Court to return the file so that petitioners can pursue review of the Order. Roofing, 689 F.2d at 988-89, 988 n.10. The Eleventh Circuit could also make this request itself to the United States District Court for the District of Maryland. See Eine, 433 F.2d at 501 n.1.

The propriety of mandamus as a remedy to review the Atlanta District Court's order is not called into question by Bankers Life & Casualty Co. v. Holland, 346 US 379 (1953), which held that mandamus was not an appropriate remedy to vacate a district court's order granting a transfer of venue under 28 U.S.C. § 1406(a) [not 1404(a)]. The relevant facts sharply distinguish that case from this. In Bankers Life, the Court noted, among other things, that the decision against the petitioner involved no abuse of judicial power, that the petitioner had not met the burden of showing that its right to issuance of the writ of mandamus was clear and indisputable, and that, after transfer, the case would remain within the realm of the same court of

appeals that had denied the writ of mandamus, since both the transferor court and the transferee court were in districts within that same circuit.

For these reasons, petitioners ask this Court to decide that the Eleventh Circuit should issue the requested writ of mandamus and direct the Atlanta District Court to take all reasonable steps to promptly retrieve the case files from the District Court of Maryland.

3. Pursuant to the writ of mandamus, the Eleventh Circuit should direct the Atlanta District Court to decide the issues raised in petitioners' motion to remand the case to state court and (before deciding those issues), as required by the local rules, to permit petitioners to file a reply to respondent's response to that motion.

Petitioning for a writ of mandamus is an established procedure for parties to seek appellate review of the denial of a motion to remand when, as here, the district court has not certified its order for immediate review and there has been no final adjudication. See e.g., Roche, 319 U.S. at 31 n.5 (1932); Colo. v. Symes, 286 U.S. 510, 521 (1932) ("the district judge . . . may permit the accused to show that he is entitled to removal authorized by section 33. If such permission be denied or, if leave being granted, his petition shall fail to meet the requirements of that section, the case is to be remanded to the state court as upon a peremptory writ of mandamus."); Md. v. Soper (No. 1), 270 U.S. 9, 29-30 (1926); Commonwealth of Pa. v. Newcomer, 618 F.2d 246 (3d Cir. 1980) (statute giving Court of

Appeals power to issue all writs necessary or appropriate in aid of its jurisdiction and agreeable to usages and principles of law provides jurisdiction for Court of Appeals to consider petition for writ of mandamus to compel district court to remand to state court state criminal prosecution against federal postal employee).

Admittedly, this case does not present the issue of federal courts interfering with state prosecutions that was presented in the cases cited above. But the procedure of seeking appellate review via mandamus is not limited to such cases. For example, the Fifth Circuit, Unit A, in Poirrier v. Nicklos Drilling Co., 648 F.2d 1063 (5th Cir. Unit A 1981), held that although an order denying a motion to remand was not final and could not be appealed directly unless certified for review by the district court pursuant to 28 U.S.C. § 1292(b), such an order may be reviewed through a petition for writ of mandamus in appropriate cases. Id. at 1064-65. Mandamus was inappropriate in that particular case, however, because the particular legal issue raised by the petitioner in Poirrier (whether maritime actions brought in state court under "savings to suitors" clause could be removed to federal court on diversity grounds) had been decided adversely to him by Circuit precedent. Id. at 1065-66.

Unlike in Poirrier, precedent of the Eleventh Circuit has not decided the underlying legal issues in this case adversely to petitioners. The Eleventh Circuit has held that the bar to maintaining an action caused by a corporation's failure to comply with the predecessor statute of O.C.G.A. § 14-2-1501 (the foreign-corporation qualification requirement)

applied in a diversity action in Georgia unless compliance was waived by the opposing party's failure to raise the issue in the appropriate pleading. Morgan Guar. Trust Co. of N.Y. v. Blum, 649 F.2d 342, 344-345 (5th Cir. Unit B 1981) ("In diversity . . . actions, state law defines the nature of the defenses, but the Federal Rules of Civil Procedure provide the manner and time in which defenses are raised and when waiver occurs.")[2] Moreover, under Eleventh Circuit precedent, a state's forum-closing statute will apply in diversity actions to bar access to the federal court sitting in the forum state unless such application unduly burdens interstate commerce. S & H Contractors, Inc. v. A. J. Taft Coal Co. Inc., 906 F.2d 1507, 1509-1510 (11th Cir. 1990), cert. denied, 498 U.S. 1026 (1991); SAR Mfg. Co. v. Dumas Bros. Mfg. Co. Inc., 526 F.2d 1283, 1285-86 (5th Cir. 1976).

The Georgia Supreme Court has held that, under O.C.G.A. § 14-2-1502, a corporation's failure to comply with O.C.G.A. § 14-2-1501 does not act as a bar to filing suit, but does prevent the corporation from further proceeding with the suit until the required certificate is obtained. Transp. Ins. Co. v. El Chico Rests., Inc., 271 Ga. 774, 774, 524 S.E.2d. 486, 487 (1999). Thus, although O.C.G.A. § 14-2-1502 does not prevent a party from asserting a counterclaim, as respondent did here in the state court, it barred respondent from taking any further action in the state court in pursuit of its

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[2] Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in the Eleventh Circuit. Maseda v. Honda Motor Co., Ltd., 861 F.2d 1248, 1252 n.3 (11th Cir. 1988).

counterclaim without obtaining the required certificate.[3]

Petitioners squarely presented the issue concerning the Georgia law and its application in the federal court: whether the bar against further proceedings recognized by the Georgia Supreme Court barred respondent in this case from either or both (1) removing the action to federal court; or (2) moving to transfer the action to another federal district. The Atlanta District Court chose not to address any of the multiple, complex issues that the parties briefed and that must be addressed to decide respondent's capacity to maintain an action. These issues include (1) whether respondent was transacting business in Georgia; (2) whether under Georgia conflicts of laws rules, the Georgia courts would apply the door-closing statute to this case and bar respondent's actions; (3) whether respondent had a valid point in claiming the Georgia requirements did not apply because its predecessor was a national bank; and (4) whether application of the Georgia statutes would unduly burden interstate commerce.

Petitioners specifically raised the issue in the Atlanta District Court three times: (1) in their reply to respondent's counterclaim; (2) in their motion to remand; and (3) in their opposition to respondent's motion to transfer. Nonetheless, the District Court refused even to consider the issue.

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[3] The Official Comments to O.C.G.A. §14-2-1502 distinguish between seeking "affirmative relief," which is precluded when the corporation does not have the required certificate, and "defending" an action, which is permitted.

The District Court disposed of petitioners' motion to remand also without permitting petitioners to file a reply addressing the arguments raised by respondent in opposition to the motion to remand. Petitioners were entitled to file a reply under Local Rule 7.1C. The Rule provides that, "A reply by the movant shall be permitted. . . ." Respondent filed its opposition to the motion to remand on September 25, 2001. Petitioners' Reply was not due until October 15, 2001 (and petitioners' counsel were preparing a reply for filing by the due date), yet the District Court ruled on the motion on October 2, 2001, without permitting the Reply and without explaining why a reply was not being permitted. In their reply, petitioners would have responded to the arguments made and issues raised by respondent (e.g., regarding its predecessor's status as a national bank -- which is, at best, a "red herring" -- and its assertion that it has engaged solely in "interstate commerce") and provide additional support for the proposition that respondent is transacting business in Georgia within the meaning of O.C.G.A. §14-2-1501. See, e.g., Winston Corp. v. Park Elec. Co., 126 Ga. App. 489, 191 S.E.2d 340 (1972) (whether corporation is transacting business in Georgia is question of fact to be resolved on ad hoc or case-by-case basis and is not governed by mechanical rules).

By not permitting a reply, the District Court acted akin to those courts that granted transfers without providing a meaningful opportunity for argument or a hearing. As in those cases, here, too, the Eleventh Circuit should vacate the Order as a matter of fundamental fairness. See, e.g., Fine, 433 F.2d at 501 ("[A]s a matter of fundamental fairness

the judge must accord an opportunity to be heard. . . .").[4]

In sum, in a diversity action, a federal court cannot entertain a state law claim if the courts of the forum could not entertain the same claim. E.g., Kinetic Concepts, Inc. v. Kinetic Concepts, Inc., 601 F. Supp. 496, 499 (N.D. Ga. 1985); R. N. Kelly Cotton Merch., Inc. v. York, 379 F. Supp. 1075, 1078 (M.D. Ga. 1973) (in diversity case, "plaintiff may not assert substantive rights in this court which it may not assert in the courts of Georgia"). The Atlanta District Court should decide whether respondent was transacting business in Georgia and, if so, whether its failure to obtain a certificate of authority to transact such business barred it from, inter alia, seeking relief in the form of removal to federal court and transfer to the Maryland District Court.

4. Pursuant to the petition for mandamus, the Eleventh Circuit should review and vacate the Atlanta District Court's order transferring the case to Maryland.

Although a transfer order under § 1404 is neither a final appealable order, nor, generally, a reviewable collateral order, the Eleventh Circuit (and most others) will entertain a mandamus petition to review a transfer order. Roofing, 689 F.2d 982 at

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[4] The Eine court followed its usual procedure of not directing an order to the district judge, but of transmitting its opinion to the district judge for further consideration consistent with the opinion. 433 F.2d at 501 n.4.

988. Accord, In re Scott, 709 F.2d 717, 719 (D.C. Cir. 1983); Ukiah Adventist Hosp. v. F.T.C., 981 F.2d 543, 546 (D.C. Cir. 1992); Golconda Mining Corp. v. Herlands, 365 F.2d 856, 857 (2d Cir. 1966); see also 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3855 (1986 & Supp. 2001) (collecting cases from every circuit).

Although the remedy of mandamus is drastic, "exceptional circumstances . . . will justify the invocation of this extraordinary remedy." Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980) (per curiam). Various Circuits have approved of the writ of mandamus to review and vacate transfer orders (1) to prevent abuses of a district court's authority to transfer a case, In re Chatman-Bey, 718 F.2d 484, 486 (D.C. Cir. 1983) (per curiam); (2) where there has been no argument or opportunity for a hearing, Fine, 433 F.2d at 501-02; (3) "to redress a clearcut abuse of discretion," A. Olinick & Sons v. Dempster Brothers, Inc., 365 F.2d 439, 445 (2d Cir. 1966); (4) when "the right of the party seeking mandamus is clear and indisputable, [a standard which] requires considerably more strained circumstances than does a mere abuse of discretion," In re Ralston Purina Co., 726 F.2d 1002, 1005 (4th Cir. 1984); and (5) when the trial court's action was "without any possible basis for judgment of discretion, so as legally to involve abuse of judicial power and responsibility." Toro Co. v. Alsop, 565 F.2d 998, 1000 (8th Cir. 1977).

The Atlanta District Court's decision granting the transfer fails under one or more of the standards set forth above. The Atlanta District Court ignored the "first to file" rule despite the absence of

compelling circumstances warranting a departure from that rule, and it effectively placed the burden of proof and persuasion on that transfer motion on petitioners in clear contravention of applicable law. Indeed, because of respondent's failure to comply with Georgia's business qualification statute, respondent should not have been permitted even to seek a transfer.

The "first to file" rule holds that when parties have instituted competing or parallel litigation in separate federal courts, the court initially having jurisdiction should hear the case absent "compelling circumstances." E.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu, 675 F.2d 1169, 1174 (11th Cir. 1982) ("In absence of compelling circumstances, the court initially seized of a controversy should be the one to decide the case").

Nothing in either respondent's motion for transfer or the Atlanta District Court's Order establishes the existence of "compelling circumstances" warranting a departure from the "first to file" rule. Rather, in ordering the transfer the District Court cited the following factors:

1. Railcar is a Georgia corporation with its principal office in the Northern District of Georgia. Nevertheless, it appears to the Court that the principal dispute is between Progress Rail and Allfirst. Progress Rail is an Alabama corporation. Therefore, the Court will not give to Plaintiffs the deference that they would receive if this action had been filed in their home forum.

2. The President of Railcar and Vice President of Progress Rail resides in Clearwater, Florida. The former President of Railcar resides in Spring Island, South Carolina. Litigating this case in Maryland would not be significantly more inconvenient to them than litigating the case in Atlanta, Georgia.
3. On the other side of the equation, there are significant advantages to transferring this action to the United States District Court for the District of Maryland. There is already pending in that district an action filed by Allfirst against Progress Rail and Railcar. Allowing the cases to be consolidated would avoid the possibility of duplicative litigation and inconsistent outcomes.
4. It is undisputed that the agreements are governed by Maryland law. It is in the interest of justice to have the case handled by a judge who is more familiar with Maryland law than the undersigned.
5. Finally, the fact that Plaintiffs consented in the FLDG to being sued in state or federal court in Maryland is a factor that weighs in favor of transfer.

The Atlanta District Court concluded that the cited factors collectively clearly outweighed petitioners' choice of forum.

As to the first and second factors cited by the District Court, the District Court ignored that:

i. Substantially all events relating to the claims

asserted by petitioners against respondent occurred in Georgia, and respondent was present in Georgia in connection with certain of those events;

ii. Petitioners' offices, resources, information, and personnel involved in matters related to this case are in Georgia;

iii. Although the current President of Railcar and Senior Vice President of Progress resides in Clearwater, Florida, he regularly travels to Atlanta to conduct business for both petitioners;

iv. Although the former President of Railcar now resides on Spring Island, South Carolina, he regularly travels to Atlanta;

v. Although Progress is an Alabama corporation, it is qualified to do business in Georgia, has offices in Atlanta, conducts substantial business in Atlanta and elsewhere in Georgia, operates a locomotive facility in Georgia, and has a number of subsidiaries, including Railcar, located in Georgia;

vi. Petitioners and respondent have had an ongoing business relationship established approximately ten years ago in furtherance of which respondent has visited petitioners in Georgia numerous times;

vii. Petitioners have acted as respondent's agent in Georgia (with authority to act in respondent's name and on respondent's behalf) and therefore respondent is conducting business in Georgia with respect to every action which petitioners have taken on respondent's behalf in Georgia; stated another way, respondent itself is in fact in Georgia;

and

viii. Railcar is a real party in the Georgia action with real claims asserted against respondent; Railcar seeks significant relief in the form of a declaration that it has not breached any of its obligations under the agreements at issue. Allfirst alleges that Railcar has breached its agreement with Allfirst, is therefore in default, and should be ordered to pay damages as well as specifically perform under the various agreements at issue. Moreover, there is not even a suggestion that Railcar joined in the action for any improper purpose.

The second factor cited by the District Court establishes merely that a transfer will shift inconvenience from one party to the other. See, e.g., Peridyne Tech. Solutions, LLC v. Matheson Fast Freight, Inc., 117 F. Supp.2d 1366, 1373 (N.D. Ga. 2000).

The third and fourth factors cited by the District Court cannot stand. No showing was made by respondent that the Maryland law applicable to the Agreements differs in any respect from Georgia law (or that any differences would be difficult for the Atlanta District Court to understand and apply) so as to justify a transfer based on judicial expertise in Maryland law. Moreover, even if it may be true that consolidation of the two actions would be in the interest of judicial economy, that does not answer which case should be transferred.

As to its fifth cited factor, the District Court appears to have given great weight to a permissive

choice-of-forum clause in the FLDG (the "FLDG Provision") (signed only by Progress, and not by Railcar), which reads as follows:

> [Progress] agrees that any action or proceeding arising out of or relating to this Guaranty may be commenced in any state or federal court in the State of Maryland and agrees that a summons and complaint commencing an action or proceeding in any such court shall be properly served and shall confer personal jurisdiction if served as provided under the laws of the State of Maryland.

The FLDG Provision does not override the first-to-file rule.

The parties' principal claims center on the Service Agreement and the Assignment Agreement, neither of which has any similar jurisdictional provision.

Even if the Service Agreement and Assignment Agreement included a similar jurisdictional provision, such a provision would not override the first-filed rule, because it is merely a permissive provision specifying a nonexclusive forum. The FLDG Provision does not purport to limit venue to courts in Maryland. Nor does it waive Progress's (or Railcar's) right to sue Allfirst in a different forum or to contend that a forum in Maryland is inconvenient. It provides merely that an action arising out of or

relating to the FLDG "may" be commenced in a court in Maryland. Such a provision is not at all comparable to the mandatory, exclusive forum selection clauses that may override the first-filed rule. Federal courts, including courts in the Eleventh Circuit, have sharply distinguished permissive, nonexclusive clauses from mandatory, exclusive clauses. In determining whether to dismiss or transfer a case where the first-filed suit has been brought in a forum not specified in the clause, permissive clauses are given little, if any, weight. Citro Fla., Inc. v. Citrovale, S.A., 760 F.2d 1231 (11th Cir. 1985) (district court erred in dismissing suit on basis of a forum selection clause that was merely nonexclusive consent by plaintiff to jurisdiction elsewhere); Snapper, Inc. v. Redan, 171 F.3d 1249, 1262, n.24 (11th Cir. 1999) (acknowledging that federal courts, including Eleventh Circuit, distinguish between mandatory and permissive forum selection clauses and refuse to dismiss suit or transfer action to specified forum when clause is permissive; a permissive clause can be given weight, however, when the plaintiff [in the first-filed or only suit] has filed the suit in the forum specified in the clause); Keaty v. Freeport Indon., Inc., 503 F.2d 955 (5th Cir. 1974) (held, district court erred in dismissing suit based on permissive/nonexclusive forum selection clause; district court should proceed to merits of contract dispute between parties). Where a district court has given significant weight to a permissive forum selection clause, the appellate court has reversed. See e.g., Autoridad de Energia Electrica de P.R. v. Ericsson, Inc., 201 F.3d 15 (1st Cir. 2000) (district court improperly remanded removed action to Puerto Rico courts on basis of nonexclusive forum selection clause in which parties agreed to submit to

jurisdiction of courts of Puerto Rico).

Petitioners have found no case (where the plaintiff brought a first-filed suit in a forum not specified in the forum selection clause) that has given substantial or significant weight to a merely permissive clause specifying another forum.

Even where a forum-selection clause is mandatory/exclusive or where the first-filed (or only) suit is filed in the forum specified in the clause (neither of which is true here), a valid forum-selection clause affects only one of the factors -- convenience of the parties -- that a district court must consider in a motion under 28 U.S.C. § 1404(a). Plum Tree, Inc. v. Stockment, 488 F.2d 754, 757 (3d Cir. 1973). The other factors are the convenience of witnesses and the interest of justice. These "are third party or public interests that must be weighed by the district court; they cannot be automatically outweighed by the existence of a purely private agreement between the parties." Plum Tree, 488 F.2d at 758. Moreover, as noted, Railcar executed no agreement consenting to being sued in Maryland.

Not only are each of the factors cited in the Order as favoring Maryland effectively neutralized by the key facts of this case, but also the factors cited in the Order could not, individually or collectively, "clearly outweigh" petitioners' choice of forum.

The Atlanta District Court's Order establishes a clear abuse of discretion and shows that the District Court failed to consider and apply the

relevant factors under controlling applicable law and the facts of the case.

In addition, and perhaps most importantly, the Atlanta District Court effectively (and improperly) shifted the burden to petitioners by permitting a transfer without requiring respondent to make a specific showing that key witnesses will be inconvenienced if the case remained before the Atlanta District Court. See e.g., Elect. Transaction Network v. Katz, 734 F. Supp. 492, 502 (N.D. Ga. 1989). Precedent in the Atlanta District Court's district requires a respondent to "list names and addresses of witnesses and the nature of their testimony, the necessity of their testimony to [its] case, and why [it] cannot properly present [its] case by using their depositions." Grey v. Cont'l Mktg. Assocs., Inc., 315 F. Supp. 826, 831 (N.D. Ga. 1970). Accord, Plum Tree, Inc., 488 F.2d at 756, 757, 757 n.2. Respondent did none of this. Instead, respondent summarily said in its brief that, "A Maryland forum is no more convenient or inconvenient for witnesses than a Georgia forum. . . ." Not only is this assertion unsupported and untrue, it is insufficient as a matter of law to justify a transfer. Under similar circumstances, in a mandamus proceeding, the Third Circuit vacated a transfer order because the movants failed to provide evidentiary support for their motion to transfer. Among deficiencies noted, the movants, like respondent here, had not provided:

> a list of the names and addresses of witnesses whom the moving party plans to call and affidavits showing the materiality of

> the matter to which these witnesses will testify, statements by the moving parties of the business difficulties or personal hardships that might result from their having to defend against the suit in the district court where it was originally brought, [and] affidavits concerning the relative ease of access to sources of documentary evidence. . . .

Plum Tree, 488 F.2d at 757 n.2.

In sum, respondent did not meet its burden to show compelling circumstances warranting the District Court's ignoring the "first to file" rule, and did not meet its burden under 28 U.S.C. § 1404(a) to show that other circumstances clearly outweigh petitioners' choice of forum. The District Court effectively placed the burden of persuasion and proof on the motion to transfer on petitioners, in clear contravention of applicable law. Appellate review and reversal of the transfer decision via mandamus is appropriate now.

5. Whether or not the Atlanta District Court recovers the case files, this Court may grant petitioners' request. Even if the Atlanta District Court's transfer of the case files has divested the Eleventh Circuit of its appellate jurisdiction over the case, it has not divested the appellate jurisdiction of this Court. Accordingly, as an alternative to making the Eleventh Circuit's review dependent on the retrieval of the case files, petitioners request this Court itself to (i) direct the Atlanta District Court to

decide the issues raised in petitioners' motion to remand the case to state court and, as required by the local rules, to permit petitioners to file a reply to respondent's response to that motion, and (ii) review and vacate the Atlanta District Court's order transferring the case to the Maryland District Court.

In fact, however, recovering the physical files should not be a prerequisite for review of the Order by the Eleventh Circuit. By what authority does a district court's physical transfer of paper divest the court of appeals of its appellate jurisdiction? Nothing in the applicable statute, 28 U.S.C. § 1294, makes the appellate jurisdiction of a court of appeals depend on whether the district court in its circuit has retained possession of the case records. Nor does the doctrine that appellate jurisdiction vanishes with the case files have any other statutory support. Nonetheless, the doctrine is widely held. See generally C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3846 and the cases cited therein. While the doctrine may provide a useful rule of thumb, it should not trump the statute. We request this Court to clarify that in a case such as this, even if the court of appeals for the transferor circuit cannot recover the physical files, it still has appellate jurisdiction for purposes of reviewing the transfer order.

CONCLUSION

For these reasons, petitioners respectfully request this Court to grant the requested writ of certiorari to the Court of Appeals for the Eleventh Circuit, to settle an important question of federal law

concerning appellate review of inter-circuit transfers and thereby resolve the problem of jurisdictional limbo in which the transfer order and related orders are unreviewable by any court.

Respectfully submitted this 1st day of April, 2002.

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 01-16231-A

IN RE:

PROGRESS RAIL SERVICES CORPORATION,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Northern District of Georgia

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BEFORE: EDMONDSON and WILSON, Circuit Judges.

BY THE COURT:

The Petition for writ of mandamus is DENIED. The Court notes that Petitioner may file a motion to re-transfer the case in the United States District Court for the District of Maryland, and that, should its motion for review be denied, appellate review of the order is available. See Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc., 689 F.2d 982, 989 (11th Cir. 1982).

Filed U.S. Court of Appeals Eleventh Circuit
Dec 31 2001 Thomas K. Kahn

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO. 1:01-V-2284-TWT
ALLFIRST BANK,	)	
Defendant.	)	

ORDER

This is a declaratory judgment action arising out of the financing of used railcars. It is before the Court on the Defendant's Motion to Dismiss [Doc. 5-1] and Motion to Transfer [Doc. 5-2], and the Plaintiffs' Motion to Remand [Doc. 12]. For the reasons set forth below, the Motion to Dismiss [Doc. 5-1] and Plaintiffs' Motion to Remand [Doc. 12] are denied and the Motion to Transfer [Doc. 5-2] is granted.

I. BACKGROUND

Plaintiff Progress Rail is an Alabama corporation. Plaintiff Railcar is a Georgia corporation. Defendant Allfirst is a Maryland bank. In November, 1998, Allfirst, Progress Rail and Railcar executed three agreements. This Assignment Agreement transferred title to 996 rail cars from Progress Rail to Allfirst. The agreement also assigned the existing leases of those cars to Allfirst and provided for Allfirst to make certain advances to Progress Rail consistent with the value of the cars and leases. Progress Rail acted as Allfirst's agent to collect rentals and to release or sell the rail cars. The First Loss Deficiency Guaranty obligated Progress Rail to guarantee certain minimum rental payments and stipulated loss values for the rail cars. The Service Agreement obligated Progress Rail to perform certain repair and maintenance work upon the rail cars.

In 1999 and 2000, the leases began to expire and the railroads returned the leased rail cars to Progress Rail. Plaintiffs contend that the market for leased coal cars had collapsed, and that the cars could not be re-leased. Allfirst contends that Progress Rail was obligated to repair the cars regardless of the economical value of the cars and to guarantee the minimum rentals called for by the Assignment Agreement. Progress Rail contends that its liability for loss of value was limited to 9.995% of the value of the leased cars and that it has paid $1.6 million more than it was obligated to pay pursuant to the First Loss Deficiency Guaranty. This is a gross oversimplification of the facts, but is sufficient to address the pending motions.

II. DISCUSSION

A. MOTION TO DISMISS

Allfirst contends that this action should be dismissed because it is a gunjumping declaratory judgment action. It contends that the sole purpose of the suit is to deprive Allfirst of litigating this matter in its forum of choice in Maryland. "In its discretion, a district court may decline to entertain a declaratory judgment action on the merits when a pending proceeding in another court will fully resolve the controversy between the parties." Ven-Fuel, Inc. v. Department of the Treasury, 673 F.2d 1194, 1195 (11th Cir. 1982). That discretion, however, is limited where other claims for coercive relief are included in a declaratory judgment action. Southwind Aviation, Inc. v. Bergen Aviation, Inc., 23 F.3d 948, 951 (5th Cir. 1994). This action is primarily a declaratory judgment action, but the Plaintiffs are seeking damages for the alleged overpayment under the First Loss Deficiency Guaranty. Therefore, the Motion to Dismiss should be denied.

B. MOTION TO TRANSFER

Allfirst contends that this action should be transferred to Maryland because of a forum selection clause in the First Loss Deficiency Guaranty and for the convenience of the parties and witnesses. "The federal courts traditionally have accorded a plaintiff's choice of forum considerable deference." In re Ricoh Corp. 870 F.2d 570, 573 (11th Cir. 1989). "When, however, the parties have entered into a contract containing a valid,

reasonable choice of forum provision, the burden of persuasion is altered." Id.

In attempting to enforce the contractual venue, the movant is no longer attempting to limit the plaintiff's right to choose its forum; rather the movant is trying to enforce the forum that the plaintiff had already chosen: the contractual venue. In such cases, we see no reason why a court should accord deference to the forum in which the plaintiff filed its action. Such deference to the filing forum would only encourage parties to violate their contractual obligations, the integrity of which are vital to our judicial system. Id.

It is true that the forum selection clause in this case can be characterized as permissive in that it permits but does not require an action against Plaintiffs to be pursued in state or federal court in Maryland. It is also true, as Plaintiffs argue, "that the federal courts distinguish between "mandatory" and "permissive" forum selection clauses." Snapper, Inc. v. Redan, 171 F.3d 1249, 1262, n. 24 (11th Cir. 1999). "They err, however, in concluding that these decisions hold that permissive clauses are unenforceable in the sense that the clauses are effectively read out of the contract." Id. Therefore, the forum selection clause is a factor to be considered in determining whether to transfer the case for the convenience of the parties and witnesses.

"For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. §1404(a). The plaintiff's choice of forum,

however, should not be disturbed unless other considerations clearly outweigh it. Robinson v. Giarmarco & Bill, P.C., 74 F.3d 253, 260 (11th Cir. 1996); 74 F.3d 253, 260 (11th Cir. 1996); see also Thornwood Lease Plan, Inc. v. Action AD of Tidewater, Inc., 650 F. Supp. 34, 38 (N.D. Ga. 1986) ("Absent clear justification, courts in this district have consistently refused to override a plaintiff's choice of forum, especially where, as here, the plaintiff has brought suit in his home district."). Greater deference is given where the plaintiff has chosen its home forum. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 255-56 (1981).

Railcar is a Georgia corporation with its principal office in the Northern District of Georgia. Nevertheless, it appears to the Court that the principal dispute is between Progress Rail and Allfirst. Progress Rail is an Alabama corporation. Therefore, the Court will not give to the Plaintiffs the deference that they would receive if this action had been filed in their home forum. The President of Railcar and Vice President of Progress Rail resides in Clearwater, Florida. The former President of Railcar car resides in Spring Island, South Carolina. Litigating this case in Maryland would not be significantly more inconvenient to them than litigating this case in Atlanta, Georgia. On the other side of the equation, there are significant advantages to transferring this action to the Unites States District Court for the District of Maryland. There is already pending in that district an action filed by Allfirst against Progress Rail and Railcar. Allowing the cases to be consolidated would avoid the possibility of duplicative litigation and inconsistent outcomes. It is undisputed that the agreements are governed by Maryland law. It is the

interest of justice to have the case handled by a judge who is more familiar with Maryland law than the undersigned. Finally, the fact that the Plaintiffs consented in the First Loss Deficiency Guaranty to being sued in state or federal court in Maryland is a factor that weights in favor of transfer. Collectively, these factors clearly outweigh the Plaintiff's choice of forum. Therefore, the motion to transfer should be granted.

C. MOTION TO REMAND

Plaintiff's Motion to Remand [Doc. 12] is based upon O.C.G.A. §14-2-1501. In the absence of a showing of a similar statute in Maryland, the motion should be denied in light of the transfer.

III. CONCLUSION

For the reasons set forth above, the Defendant's Motion to Dismiss [Doc. 5-1] is DENIED. The Motions to Transfer [Doc. 5-2] is GRANTED. Plaintiff's Motion to Remand [Doc. 12] is DENIED. The Clerk is directed to transfer this case to the United Stated District Court for the District of Maryland.

SO ORDERED, this 1 day of October, 2001.

/s/_____
THOMAS W. THRASH, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD.,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION FILE NO. 1:01-V-2284-TWT
ALLFIRST BANK,	)	
Defendant.	)	

ORDER

This is a breach of contract action. It is before the Court on the Plaintiffs' Motion to Certify [Doc. 21-1] and Motion to Vacate [Doc. 21-2]. On October 2, 2001, the Court entered an order transferring this case to the United States District Court for the District of Maryland. This Court lost jurisdiction of the case when it was transferred to the United States District Court for the District of Maryland. In re Miller, 485 F.2d 74, 76 (5th Cir. 1973) ("The District Court in Florida relinquished jurisdiction over the case when it transferred the matter to the Louisiana District Court.") The Plaintiffs' Motion to

Certify [Doc. 21-1] and Motion to Vacate [Doc. 21-2] are DENIED.

SO ORDERED, this 4th day of January, 2002.

/s/
Thomas W. Thrash, Jr.
United States District Judge

Supreme Court, U.S.
FILED
MAY 9 2002
OFFICE OF THE CLERK

No. 01-1482

In The

Supreme Court of the United States

PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD.,

Petitioners,

v.

ALLFIRST BANK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

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ISSUES PRESENTED

1. The United States Court of Appeals for the Eleventh Circuit was correct in denying the petition for a writ of *mandamus* because the United States District Court for the Northern District of Georgia, based on the case-specific facts before it, did not abuse its discretion in ordering a transfer of the case to the District of Maryland pursuant to 28 U.S.C.A. § 1404(a).

2. The United States District Court for the Northern District of Georgia properly exercised its discretion, based on the case-specific facts before it, in ordering a transfer of the case to the District of Maryland pursuant to 28 U.S.C.A. § 1404(a).

3. The State of Georgia may not limit the right of a non-resident defendant sued in a Georgia court to remove the case under 28 U.S.C.A. § 1441 because the non-resident defendant has not registered to do business in Georgia.

CORPORATE DISCLOSURE STATEMENT

Allfirst Bank is a wholly owned subsidiary of Allfirst Financial, Inc., a bank holding company wholly owned by Allied Irish Banks plc, a publically held Irish banking corporation whose shares trade on the New York Stock Exchange as American depository receipts.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

CITATIONS OF REPORTS OF OPINIONS AND ORDERS BY THE COURTS 1

STATEMENT OF JURISDICTION 1

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI* 2

STATEMENT OF THE CASE 2

A. The Financing Transaction Which Engendered The Dispute 2

B. Allfirst's Accommodation To Progress Rail 3

C. Progress Rail Renounces Its Obligations 4

D. Progress Rail's Anticipatory, Forum Shopping Strike 5

E. The Georgia Case Is Transferred To Maryland 6

THE REASON WHY A WRIT OF *CERTIORARI* SHOULD NOT BE ALLOWED 10

A. There Is No Important Question Of Federal Law Concerning Inter-Circuit Transferees Involved In This Case 11

B. The Eleventh Circuit Was Not Required To Issue A Writ Of *Mandamus* 17

C. The State Of Georgia May Not Limit The Right Of A Non-Resident Defendant To Remove A Case With The Diversity Jurisdiction Pursuant To 28 U.S.C.A. § 1441 18

TABLE OF CONTENTS – Continued

Page

D. The Facts Of The Case Required A Transfer 21

E. This Court Should Not Assume The Function Of The Eleventh Circuit..... 22

CONCLUSION 23

APPENDICES

Memorandum and Order of the United States District Court for the District of Maryland (Harvey, S.J.) dated December 27, 2001 entered in the consolidated case entitled *Allfirst Bank v. Progress Rail Services Corporation and Railcar, Ltd.* (Civil No. H-01-2527) and *Progress Rail Services Corporation and Railcar, Ltd. v. Allfirst Bank* (Civil No. H-01-2991) A-1

Memorandum and Order of the United States District Court for the District of Maryland (Harvey, S.J.) dated January 16, 2002 entered in the consolidated case entitled *Allfirst Bank v. Progress Rail Services Corporation and Railcar, Ltd.* (Civil No. H-01-2527) and *Progress Rail Services Corporation and Railcar, Ltd. v. Allfirst Bank* (Civil No. H-01-2991) B-1

Revised Scheduling Order of the United States District Court for the District of Maryland (Harvey, S.J.) dated April 2, 2002 entered in the consolidated case entitled *Allfirst Bank v. Progress Rail Services Corporation and Railcar, Ltd.* (Civil No. H-01-2527) and *Progress Rail Services Corporation and Railcar, Ltd. v. Allfirst Bank* (Civil No. H-01-2991) C-1

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California,
460 U.S. 605 (1983) 15

Arthur v. E.I. DuPont de Nemours & Co.,
58 F.3d 121 (4th Cir. 1995) 20

Bankers Life & Cas. Co. v. Holland,
346 U.S. 379 (1953) 17

Brock v. Entre Computer Ctrs., Inc.,
933 F.2d 1253 (4th Cir. 1991) 16

Chrysler Credit Corp. v. Country Chrysler, Inc.,
928 F.2d 1509 (10th Cir. 1991) 12, 13, 15

In re Cragar Indus., Inc.,
706 F.2d 503 (5th Cir. 1983) 15

Home Ins. Co. v. Morse,
87 U.S. 445 (1874) 20

Linnell v. Sloan,
636 F.2d 65 (4th Cir. 1980) 16

Markham v. City of Newport News,
292 F.2d 711 (4th Cir. 1961) 20

In re Nine Mile Ltd.,
673 F.2d 242 (8th Cir. 1982) 13, 17

Roofing & Sheet Mētal Servs., Inc. v.
La Quinta Motor Inns, Inc.,
689 F.2d 982 (11th Cir. 1982) ..... *passim*

Shamrock Oil & Gas Corp. v. Sheets,
313 U.S. 100 (1941) 20

TABLE OF AUTHORITIES – Continued

Page

Songbyrd, Inc. v. Estate of Grossman,
206 F.3d 172 (2d Cir. 2000).....12, 16

Starnes v. McGuire,
512 F.2d 918 (D.C. Cir. 1974)..... 14

Stewart Org., Inc. v. Ricoh Corp.,
487 U.S. 22 (1988) 12

Technitrol, Inc. v. McManus,
405 F.2d 84 (8th Cir. 1968)..... 13

Warrick v. General Elec. Co. (In re Warrick),
70 F.3d 736 (2d Cir. 1995).....12, 17

STATUTES

28 U.S.C.A. § 1292(b) (West 1993)..... *passim*

28 U.S.C.A. § 1404(a) (West 1993)..... *passim*

28 U.S.C.A. § 1441 (West 1994)..... *passim*

RULES

FED. R. CIV. P. 13..... 6

CITATIONS OF REPORTS OF OPINIONS AND ORDERS BY THE COURTS

In addition to the Opinions and Orders cited and placed in the Appendices by Petitioners, Respondent cites to the following unreported opinions and orders:

1. Memorandum and Order of the United States District Court for the District of Maryland (Harvey, S.J.) dated December 27, 2001 entered in the consolidated case entitled *Allfirst Bank v. Progress Rail Services Corporation and Railcar, Ltd.* (Civil No. H-01-2527) and *Progress Rail Services Corporation and Railcar, Ltd. v. Allfirst Bank* (Civil No. H-01-2991), a copy of which is set forth in Appendix A at page A-1.

2. Memorandum and Order of the United States District Court for the District of Maryland (Harvey, S.J.) dated January 16, 2002 entered in the previously cited consolidated case, a copy of which is set forth in Appendix B at page B-1.

3. Revised Scheduling Order of the United States District Court for the District of Maryland (Harvey, S.J.) dated April 2, 2002 entered in the previously cited consolidated case, a copy of which is set forth in Appendix C at page C-1.

STATEMENT OF JURISDICTION

Respondent accepts the Statement of Jurisdiction in the Petition.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

STATEMENT OF THE CASE

A. The Financing Transaction Which Engendered The Dispute.

On November 30, 1998, Allfirst, a commercial bank located in Maryland, entered into a financing transaction with Progress Rail, an Alabama company, and its Georgia subsidiary, Railcar. Allfirst advanced $13,184,510 and obtained title to 996 used railcars that were under lease by Progress Rail or Railcar to several different railroads, together with an assignment of the leases. Because the assigned leases would expire before the term of the financing ended on November 1, 2001, Allfirst required Progress Rail, the parent company, to guarantee the flow of rent to the end of the financing term, whether or not the leases were in place and whether or not rent was paid, up to a specified amount equal to the future value of a percentage of the purchase price paid by Allfirst. Progress Rail also guarantied that the proceeds from any casualty or sale would not be less than an agreed upon stipulated loss value for each railcar, which insured a return on the purchase price paid by Allfirst (i.e., the principal advanced). Because Allfirst is a bank, it required Progress Rail, whose businesses include the repair and renovation of used railcars, to assume the obligation to maintain and repair the cars so that they always were in a condition to be leased for not less than a minimum net monthly rent.

To evidence these agreements, the parties executed three principal documents: (a) an Assignment Agreement between Allfirst and Progress Rail and Railcar, in which

the used railcars and related leases were assigned to Allfirst in exchange for the advance and in which the minimum net monthly rental and stipulated loss values were established; (b) a Service Agreement between Allfirst and Progress Rail in which Progress Rail agreed to maintain and repair and keep the railcars to the specified condition; and (c) a First Loss Deficiency Guaranty in which Progress Rail guarantied for the benefit of Allfirst, among other things, receipt of the minimum net monthly rent and stipulated loss values up to the specified limit. All of the documents required the application of Maryland law and the First Loss Deficiency Guaranty contained a permissive forum selection clause designating Maryland as the venue for litigation.

B. Allfirst's Accommodation To Progress Rail.

In late 1999 or early 2000, several leases expired and the railcars were returned by the lessee railroads. Progress Rail announced to Allfirst that these cars were in such poor condition that it would be economically burdensome to repair them and that it intended to scrap the cars. In addition, another railroad, which was under a net lease and obligated to pay rent regardless of the condition of the railcars, returned its railcars to Progress Rail because they were in too poor a condition to be used. Progress Rail unilaterally, without prior notice to Allfirst, accepted the railcars, canceled the net lease, and scrapped the cars.

Progress Rail told Allfirst that it would pay out the financing on the railcars that it did not wish to repair by paying the stipulated loss values and any accrued and unpaid rent. Allfirst was under no obligation to permit

Progress Rail to avoid its obligation to repair the cars to a serviceable and leaseable condition, regardless of the cost, or to permit the cancellation of the net lease. Allfirst did so as an accommodation to its customer and with the express understanding, confirmed by e-mail, that the limit under the First Loss Deficiency Guaranty would not be affected by the transactions.

C. Progress Rail Renounces Its Obligations.

In 2001, after the railcars had been scrapped and Allfirst was paid the sums due it, Progress Rail asserted that the sums it paid had fully discharged the limit of the First Loss Deficiency Guaranty and that it had no further liability to Allfirst. Progress Rail even asserted that it had overpaid on the First Loss Deficiency Guaranty and was entitled to a refund.

Allfirst denied these contentions and advised that both the First Loss Deficiency Guaranty and the Service Agreement remained in full force and effect and that it would declare a default and take enforcement action if Progress Rail did not perform its obligations in accordance with the agreements it had executed.

The parties entered into various discussions and entertained the possibility of submitting the dispute to mediation. When it became obvious that Progress Rail did not intend to fulfill its contractual obligations, the matter was transferred to Allfirst's Special Credits (i.e., workout) division, where financings that were in or about to be in default were administered. The transfer was a prelude to Allfirst commencing judicial proceedings against Progress Rail. By letter of July 24, 2001, Progress

Rail was notified of this change, told that Allfirst did not intend to mediate the dispute, and intended to enforce its rights under the applicable documents.

D. Progress Rail's Anticipatory, Forum Shopping Strike.

Realizing that suit was imminent, Progress Rail withheld from Allfirst the August 1, 2001 payment, which included sums received from lessees that were supposed to be remitted to Allfirst. Progress Rail and Railcar on this same day – which is but six days after Progress Rail was notified that its file had been transferred to workout for collection – filed a declaratory judgment action in the Superior Court of Fulton County, Georgia to obtain a declaration that Progress Rail had not breached the contracts with Allfirst and had no liability thereunder. Progress Rail requested a declaration that it was not obligated under the Service Agreement and that it had fully satisfied its obligation under the First Loss Deficiency Guaranty. The complaint requested an injunction against Allfirst declaring Progress Rail in default and an order requiring Allfirst to refund any overpayments if the Court determined that Progress Rail had paid more than it owed. The complaint did not ask for a monetary judgment.

Railcar joined in the declaratory judgment action as a plaintiff, although it was not a party to either the First Loss Deficiency Guaranty or the Service Agreement and had only a speculative liability under the Assignment Agreement. Railcar was not an essential or indispensable

party to the action and apparently was joined only to provide a nexus to Georgia.

E. The Georgia Case Is Transferred To Maryland.

Faced with clear defaults by Progress Rail under the three contracts, Allfirst formally declared Progress Rail and Railcar in default on August 23, 2001. With the default declared, Allfirst set about enforcing its rights against Progress Rail.

On August 24, 2001, Allfirst removed the Fulton County suit to the United States District Court for the Northern District of Georgia, where it was assigned to United States District Judge Thomas W. Thrash, Jr. and, at the same time, filed suit in the United States District Court for the District of Maryland for breach of contract and to enforce its rights in consequence of the breach. Allfirst filed an answer in the Georgia Case on August 28, 2001. As compelled by FED. R. CIV. P. 13, Allfirst filed a counterclaim at the time it filed its answer. This counterclaim mirrored the complaint filed in the United States District Court for the District of Maryland.

In addition to its answer and counterclaim, Allfirst moved for an order either dismissing the anticipatory declaratory judgment action or for the case to be transferred to the District of Maryland. Allfirst specifically brought to Judge Thrash's attention the co-pending Maryland case.

Progress Rail opposed the motion to dismiss or transfer and moved to remand the case back to the Superior Court of Fulton County. Progress Rail argued in its

motion that Allfirst was required to qualify to do business in Georgia and, because it had not done so, could not remove the state court case to Federal Court or, presumptively, file a counterclaim or put up a defense of any kind.

Judge Thrash agreed with Allfirst that the litigation belonged in Maryland and directed that the case be transferred to the District of Maryland, where it could be consolidated into the case pending there. Judge Thrash did not address the motion that the case had to be remanded to the Superior Court for Fulton County, which he found to be moot due to the transfer. The Georgia Clerk thereupon transferred the case to the District of Maryland, where it presently resides.

Not content with Judge Thrash's rulings, Progress Rail asked for reconsideration of the transfer order or for Judge Thrash to certify the transfer order for immediate appeal to the Eleventh Circuit pursuant to 28 U.S.C.A. § 1292(b) (West 1993) as involving a controlling question of law. Progress Rail also filed a petition for *mandamus* to the Eleventh Circuit challenging the transfer order. Judge Thrash denied the motion for reconsideration and the motion to certify the transfer order for immediate appeal, noting that he lost jurisdiction when the case was transferred to Maryland. The Eleventh Circuit denied the petition for *mandamus*, rejecting Progress Rail's entreaty that the Eleventh Circuit order Judge Thrash to request the Maryland court to return the case to Georgia so that he and the Eleventh Circuit would again have jurisdiction to address Progress Rail's demands. The Eleventh Circuit, instead, suggested that a motion for retransfer be filed in

Maryland if Progress Rail wished to further pursue the matter.

Even before the petition for *mandamus* had been ruled upon, Progress Rail had moved in the United States District Court for the District of Maryland for that Court either to retransfer the case back to the Northern District of Georgia or to remand the case to the Superior Court of Fulton County Georgia, where, according to Progress Rail, Allfirst is not permitted to defend itself. Progress Rail also moved in the action initiated by Allfirst in Maryland for that action either to be dismissed or stayed in favor of the Georgia case.

With both cases before the United States District Court for the District of Maryland, Allfirst moved to consolidate the two actions. Progress Rail, in its crusade to return the litigation to a local Georgia court, opposed the consolidation.

Senior United States District Judge Alexander Harvey II denied Progress Rail's motion to retransfer the transferred case back to Georgia, either to the Federal Court or the Superior Court for Fulton County. He also denied the motion to dismiss or stay the Maryland case and granted Allfirst's motion to consolidate. In his ruling, Judge Harvey acknowledged that the principles of law of the case required him to afford deference and comity to Judge Thrash's ruling and to not alter that ruling unless it was clearly erroneous. This said, Judge Harvey nevertheless, independently reviewed and analyzed the facts of the case under the standards of 28 U.S.C.A. § 1404(a) (West 1993) and concluded, as had Judge Thrash, that the litigation properly should be in Maryland. Judge Harvey

also held there was no basis for a Maryland Federal Court to remand a case properly removed under 28 U.S.C.A. § 1441 (West 1994) to a Georgia state court on the basis of a Georgia statute requiring foreign corporations doing intrastate business in Georgia to qualify before being able to file suit in a Georgia court. (App. A at A-10, A-11).

Progress Rail then moved for an order certifying as immediately appealable to the Fourth Circuit pursuant to 28 U.S.C.A. § 1292(b) the order denying the motion to retransfer on the ground that the ruling involved a controlling question of law. Judge Harvey denied this motion before Allfirst could even file an opposition. In his opinion, Judge Harvey noted Progress Rail's vexatious tactics by stating "Ever since Civil No. H-01-2991 was transferred here, counsel for Progress Rail and Railcar have persisted in litigating and relitigating adverse rulings made by Judge Thrash and by this Court." (App. B at B-2). Judge Harvey observed that if an interlocutory appeal were taken, Progress Rail would have to show that Judge Thrash abused his discretion in transferring the case to Maryland and that he abused his discretion in not retransferring the case back to Georgia. Noting that he reviewed the case and fully agreed with Judge Thrash, he pointed out that "Rulings under § 1404(a) are based on case-specific factors and hardly involve controlling questions of law as to which there is a substantial ground for a difference of opinion." (App. B at B-4).

Progress Rail did not, as it did earlier in the Eleventh Circuit, seek *mandamus* from the Fourth Circuit. Instead, Progress Rail has petitioned for *certiorari* to ask the United States Supreme Court to review the case-specific facts of this dispute and hold that two United States

District Judges, each of whom conducted independent reviews of these facts, abused their discretion when they independently concluded that the case should be litigated in Maryland.

When he denied the motion to retransfer, Judge Harvey entered a scheduling order which set the non-jury consolidated case on a schedule for a prompt resolution. (App. C at C-1). After the scheduling order was entered, Progress Rail requested a short extension in the scheduled dates, which request was consented to by Allfirst and granted by Judge Harvey. As presently set, discovery is to conclude on June 21, 2002 and a pretrial conference is set for July 29, 2002, at which time a date for a bench trial will be set. Based on the current schedule, it is likely that the consolidated case will both be tried and decided before briefs would even be filed if *certiorari* were granted.

THE REASON WHY A WRIT OF *CERTIORARI* SHOULD NOT BE ALLOWED

The overriding reason why a writ of *certiorari* should not be issued by this Court is the glaring unimportance and case-specific nature of the issues raised by the Petitioners. The Petition is simply one more obsessive attempt by the Petitioners to overturn a discretionary decision correctly made by a United States District Judge to transfer the case pursuant to 28 U.S.C.A. § 1404(a) from the Northern District of Georgia to the District of Maryland. On the eve of being declared in default under the financing documents and of suit being filed by Allfirst in

Maryland, Petitioners instituted an anticipatory declaratory judgment action in a local Georgia court to obtain a declaration that they were not in default under the financing documents they had breached. This gun-jumping declaratory judgment action was filed in Georgia despite the presence in the principal document in dispute of a contractual forum selection clause designating Maryland as the location for any litigation and of choice of law provisions in all of the financing documents requiring the application of Maryland law and despite any compelling reason for the case to be in Georgia beyond Petitioners' preference. Two United States District Judges independently reviewed the facts and circumstances of this case and determined that the litigation should be in Maryland, not Georgia. Rather than move on to a resolution of the case on the merits, Petitioners are now asking the United States Supreme Court to review a case-specific, discretionary decision and to return the case to Georgia, where it never should have been brought in the first instance. The Petition does not bring forward a matter deserving, much less requiring, the attention of this Court.

A. There Is No Important Question Of Federal Law Concerning Inter-Circuit Transferees Involved In This Case.

This case does not involve an important question of federal law concerning inter-circuit transfers under 28 U.S.C.A. § 1404(a), as Petitioners assert. This is not a situation in which a hasty transfer of the files by the Georgia clerk's office has created a "jurisdictional limbo" or made the transfer order "unreviewable by any court." This is simply a situation in which the Petitioner would

like to re-argue the merits of a lost motion in the United States Supreme Court.

Allfirst moved for a dismissal or transfer of the anticipatory declaratory judgment action after the case was removed to Federal Court. The motion was fully briefed by both sides, with supporting affidavits and exhibits. Judge Thrash, based upon a full briefing, agreed with Allfirst and ordered the case transferred to Maryland. This decision was committed to his sound discretion. *See Stewart Org, Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) ("Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.' "), and could be reviewed only for abuse of discretion. *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991); *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 985 (11th Cir. 1982). As an interlocutory ruling, the decision was not immediately appealable. *Songbyrd, Inc. v. Estate of Grossman*, 206 F.3d 172 (2d Cir. 2000). Although not immediately appealable, Circuit Courts of Appeal have indicated a willingness to permit *mandamus* review based upon the abuse of discretion standard. *Warrick v. General Elec. Co. (In re Warrick)*, 70 F.3d 736, 740 (2d Cir. 1995) ("clear abuse of discretion"); *Roofing & Sheet Metal*, 689 F.2d at 985. But, as the Eleventh Circuit observed in *Roofing & Sheet Metal*, "[t]he writ has rarely issued to correct a district court's abuse of discretion in granting or denying a motion to transfer." *Id.* at 987 (citation omitted).

The Clerk's office, immediately upon the entry of Judge Thrash's order, transferred the case to Maryland,

which divested the Georgia Court of jurisdiction. *Chrysler,* 928 F.2d at 1516-17; *Roofing & Sheet Metal,* 689 F.2d at 988, n.10. There was no local rule requiring the Clerk to retain the file for a specified period before sending it on and no stay of the transfer order was in effect at the time the Clerk sent the file to Maryland. Although various Circuit Courts have indicated that the better practice would be for the Clerk to delay the transfer for a short period to permit a motion for reconsideration or a petition for *mandamus* to be filed, no Circuit Court has held that a prompt transfer is unlawful or ineffective. *See Chrysler,* 928 F.2d 1509; *Roofing & Sheet Metal,* 689 F.2d 982; *In re Nine Mile Ltd.,* 673 F.2d 242 (8th Cir. 1982); *Technitrol, Inc. v. McManus,* 405 F.2d 84 (8th Cir. 1968). There is no evidence that the transfer was made for the purpose of denying Petitioners an opportunity to move for reconsideration or to petition for *mandamus.* There is no evidence that Judge Thrash directed the Clerk to immediately transfer the case to insulate his ruling from review. Petitioners never asked for a stay of the transfer order nor in any way indicated they would seek *mandamus* if the transfer were ordered.

Despite the transfer and the lack of jurisdiction, Petitioners moved for reconsideration or for a certification under 28 U.S.C.A. § 1292(b). Petitioners were apparently of the view that the transfer order involved a "controlling question of law" rather than a case-specific and discretionary evaluation of the facts and that an immediate appeal would "materially advance the ultimate termination of the litigation" rather than create an unnecessary appellate diversion that would delay a decision on the merits. Judge Thrash denied the motion on the basis that

the transfer of the case file to Maryland divested him of jurisdiction. Implicit in this ruling was Judge Thrash's rejection of Petitioners' request that he redo what he had just ruled upon, without the presentation of any new fact or argument beyond what was originally presented to him, and that he send to the Eleventh Circuit for an interlocutory appeal, a matter not even arguably involving a controlling issue of law and that would simply prolong rather than advance ultimate resolution of the case. Judge Thrash certainly was aware of the Eleventh Circuit's decision in *Roofing & Sheet Metal* and of his ability to request the Maryland Clerk to return the file to Georgia. That he declined to do so evidences the absence of merit in the motion before him and not an incorrect ruling.

Petitioners simultaneously petitioned the Eleventh Circuit for a writ of *mandamus* to compel Judge Thrash to request the Maryland Court to return the file so that he could rule on the motion for reconsideration or for certification. The Eleventh Circuit denied the petition and suggested that Petitioners move for a retransfer in Maryland and seek appellate review in the Fourth Circuit if the motion was denied. *See id.*, 689 F.2d at 989; *Starnes v. McGuire*, 512 F.2d 918, 924 (D.C. Cir. 1974) ("Nevertheless, the appropriate course of action when physical transfer has already taken place at the time the petition for mandamus is filed is a new proceeding seeking retransfer in the transferee court, which may be reviewed by the transferee circuit."). The order denying the petition cited *Roofing & Sheet Metal*, clearly indicating that the Eleventh Circuit recognized that it had the power to order the Georgia Court to request a return of the file if there were

any purpose to its doing so. The Eleventh Circuit instead concluded that there was no purpose to be served by ordering the Georgia Court to request the return of a file from Maryland so that it simply could deny a motion to reconsider or permit Petitioners to file another petition for *mandamus* of a fact-specific discretionary ruling that would be doomed to ultimate denial.

Not deterred by the adverse ruling, Petitioners moved for a retransfer in the Maryland Court and for the Maryland Court to stay or dismiss the parallel case filed in Maryland by Allfirst. Judge Harvey denied the motion and granted Allfirst's motion to consolidate the two cases. In doing so, Judge Harvey recognized the principle of law of the case. But, contrary to Petitioner's assertion, Judge Harvey did not apply an "inflexible standard" and refuse to consider the merits of the transfer order. Instead, Judge Harvey applied the correct law of the case standard by holding that a transferee court should accept the transfer " 'except under the most impelling and unusual circumstances' or if the transfer order is 'manifestly erroneous.' " (App. A at A-6) (quoting *In re Cragar Indus., Inc.*, 706 F.2d 503, 505 (5th Cir. 1983)); *see also Arizona v. California*, 460 U.S. 605, 618 (1983); *Chrysler*, 928 F.2d at 1516-18. After noting that Petitioners had not shown that "Judge Thrash's transfer order is manifestly erroneous," Judge Harvey held that "the case-specific factors in the case fully support the ruling made by Judge Thrash in granting the motion to transfer." (App. A at A-7). Judge Harvey, although perhaps not required to do so, then went on in detail to review and analyze these case-specific factors that supported Maryland as the proper situs for the litigation in his view. Hence, despite

what Petitioners would imply, Judge Harvey did not simply deny the motion to retransfer through a thoughtless application of law of the case, but gave his own evaluation and conclusion. In the motion for a retransfer, Petitioners obtained a full review of Judge Thrash's order and were told by Judge Harvey that Judge Thrash was correct.

After the motion for retransfer was denied, Petitioners moved for certification under 28 U.S.C.A. § 1292(b) of an immediate interlocutory appeal to the Fourth Circuit. This motion was denied. (App. B at B-6). In so doing, Judge Harvey held that "Rulings under § 1404(a) are based on case-specific factors and hardly involve controlling questions of law as to which there is a substantial ground for a difference of opinion" and that "[t]he Court is satisfied that an immediate appeal from its interlocutory ruling would not advance the ultimate termination of this litigation." (App. B at B-5). Petitioners did not, however, file a petition for *mandamus* in the Fourth Circuit to challenge the denial of the motion for retransfer. And, as Judge Harvey pointed out in denying the motion for certification, Petitioners remain free to appeal the denial of the motion to retransfer at the conclusion of the case. *Songbyrd*, 206 F.3d at 177-78 (filing of motion to retransfer required to enable transfer to be appealed in transferee circuit); *Brock v. Entre Computer Ctrs., Inc.*, 933 F.2d 1253, 1257 (4th Cir. 1991); *Linnell v. Sloan*, 636 F.2d 65, 67 (4th Cir. 1980). Contrary to their protestations, Petitioners have had their position on the transfer heard on the merits after a full briefing and have had the ruling given all of the trial court and appellate review to which it is entitled at this stage of the litigation. There is no unsettled law that requires resolution by the

United States Supreme Court. There are only disgruntled litigants that will not accept an adverse ruling until the Supreme Court denies review of that ruling.

B. The Eleventh Circuit Was Not Required To Issue A Writ Of *Mandamus*.

The law appears beyond cavil that the Eleventh Circuit could have issued a writ of *mandamus* to require the Georgia District Court to request the Maryland District Court to return the transferred case file. The law also is clear that the Eleventh Circuit and the Georgia District Court lacked the power to force the Maryland Court to return the case or rescind its order consolidating the case filed in Maryland with the case filed in Georgia. *Warrick*, 70 F.3d at 737 ("[W]e recognize that we have no power to compel the Pennsylvania court to comply with the request."); *Nine Mile*, 673 F.2d at 244.

In denying the petition for *mandamus*, the Eleventh Circuit did not rule that it lacked the power to issue the writ or that the writ could not, in an appropriate case, be issued to direct a District Court to request a return of the transferred file, as *Roofing & Sheet Metal*, 689 F.2d 982, certainly indicates can be done. The Eleventh Circuit simply held that the case before it did not justify the issuance of the extraordinary and drastic remedy represented by a writ of *mandamus*. The Eleventh Circuit merely concluded the Petitioners had not met their burden of showing that their right to the issuance of *mandamus* was "clear and indisputable." *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953). This proper ruling

by the Eleventh Circuit does not require review by the United States Supreme Court.

C. The State Of Georgia May Not Limit The Right Of A Non-Resident Defendant To Remove A Case With The Diversity Jurisdiction Pursuant To 28 U.S.C.A. § 1441.

Continuing their quest to return the case to Superior Court of Fulton County, Georgia, Petitioners argue that *certiorari* should be granted to review the refusal of the Eleventh Circuit to issue a writ of *mandamus* to require the Georgia District Court to remand the case to state court because Allfirst had not qualified to do business in Georgia at the time it removed the case. Petitioners made this *novel* argument to the Georgia District Court, which did not rule upon it due to the transfer of the case to Maryland. Judge Thrash held that the transfer made the issue of qualification in Georgia moot. In doing so, Judge Thrash ruled that the issue was moot before Petitioners filed a reply brief on the merits. Petitioners take particular umbrage at their inability to reply to Allfirst's opposition, but do not explain how a reply to the merits, addressing issues like whether national banks must register to do business in foreign states, would have made the issue any less moot at the time Judge Thrash issued his transfer order. Maryland does not require Maryland corporations to register to do business in Georgia, no matter how much business they may transact in Georgia, as a condition of access to Maryland courts. The issue was clearly moot when Judge Thrash denied the motion to remand. A reply brief would not have changed this.

Petitioners raised this same issue before the Maryland District Court, arguing that the Maryland District Court should remand the case to the Superior Court of Fulton County because Allfirst had not registered to do business in Georgia. Judge Harvey denied the motion, noting that:

> In their pending motion, Progress Rail and Railcar also ask this Court to remand Civil No. H-01-2991 to the Superior Court of Fulton County, Georgia. The request is an unusual one. No case has been cited by the movants and this Court knows of none which would authorize a federal court in one state to remand a case to a state court in another state.

(App. A at A-10).

Allfirst was a national bank at all pertinent times and never conducted sufficient intra-state business to require it to register to do business in Georgia even if it were not a national bank. Nor was Allfirst required to qualify to do business in Georgia to avail itself of the privilege of being sued in a Georgia court. Petitioners can cite to no authority – because none exists – to support their contention that a corporation must qualify to do business in a state as a foreign corporation before the corporation can be sued in that state. Nor can Progress Rail point to any authority that an out of state corporation which is sued in a foreign forum cannot defend itself if it has not qualified to do business.

Petitioners advance an argument premised on a principle that was rejected by the Supreme Court and other Federal Courts long ago. The removal jurisdiction of the Federal Courts is provided by 28 U.S.C.A. § 1441. This

Federal jurisdiction is not dependant upon and cannot be restricted by any state statute or law. The right to remove a case brought in a state court from that state court to Federal Court is a Federal right that no state legislature can control, restrict, or condition. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941) ("[T]he removal statute, which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied."); *Home Ins. Co. v. Morse*, 87 U.S. 445 (1874) (Wisconsin statute could not require insurance companies to waive the right to remove cases to Federal Court as a condition of being permitted to do business in Wisconsin); *Markham v. City of Newport News*, 292 F.2d 711, 714-15 (4th Cir. 1961); *Arthur v. E.I. DuPont de Nemours & Co.*, 58 F.3d 121, 125 (4th Cir. 1995) ("States cannot by definition or characterization enlarge or narrow the categories of cases subject to removal."). Georgia cannot by statute permit defendant corporations which have registered to do business to remove a case to Federal Court while denying this right if the defendant corporation has not registered.

Diversity jurisdiction and the right of removal based upon diversity jurisdiction are matters of Federal subject matter jurisdiction that only Congress can define. A state may bar its courts, and in turn the Federal Courts under diversity jurisdiction, to a plaintiff foreign corporation that has not registered to do business. But a state may not permit that same foreign corporation to be sued in its courts and then deny that foreign corporation the right to

remove the case to Federal Court if the elements of Federal subject matter jurisdiction are present. As Judge Harvey held:

> Allfirst removed the case to the Northern District of Georgia pursuant to 28 U.S.C. § 1441 *et seq.* on the ground that diversity jurisdiction exists. Allfirst has fully complied with this federal statute, and state law could not be construed to prevent a removal authorized by federal law.

(App. A at A-10, A-11). There is no basis for a remand or for the Eleventh Circuit to issue a *mandamus* writ to compel a remand. There is no reason for this Court to issue *certiorari* to review the Eleventh Circuit's denial of *mandamus*.

D. The Facts Of The Case Required A Transfer.

Even assuming the Eleventh Circuit had issued a writ of *mandamus* and reviewed the District Court's transfer order, the standard of review is that of abuse of discretion. Without belaboring the factual details, Judge Thrash's ruling was more than an appropriate exercise of his discretion based on the facts and circumstances of the case before him. These facts and circumstances also were reviewed by Judge Harvey, who reached the same conclusion. Petitioners now ask the United States Supreme Court to review these fact-specific circumstances through the issuance of a writ of *certiorari* directed to the Eleventh Circuit's declining to issue a writ of *mandamus*. Supreme Court review should not be wasted on a consideration of

the merits of a fact-specific, discretionary, and interlocutory decision of a District Court, particularly where that decision was entirely correct.

E. This Court Should Not Assume The Function Of The Eleventh Circuit.

In their last argument in support of the allowance of a writ of *certiorari*, Petitioners ask this Court to assume the function and role of the Eleventh Circuit and do directly what the Eleventh Circuit declined to do when it denied the petition for a writ of *mandamus*. *Certiorari* should not be granted so that the United States Supreme Court can substitute itself for the Eleventh Circuit and act as a sort of super Circuit Court of Appeals, all for the purpose of returning an abusively filed anticipatory declaratory judgment action from the District to which it properly belongs to a District in which it never should have been filed in the first instance.

Nor is there any reason *certiorari* should be granted for the purpose of reviewing the settled rule that transfer of a case file to a District Court outside of a judicial circuit divests the Circuit Court of Appeals of appellate jurisdiction to review the transfer order. *Roofing & Sheet Metal*, 689 F.2d 982. This is a settled point of law whose review would only waste the important time of this Court.

CONCLUSION

This case does not merit review by the United States Supreme Court. *Certiorari* should be denied.

Respectfully submitted,

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May 9, 2002

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLFIRST BANK	*	
Plaintiff	*	
vs.	*	CIVIL NO. H-01-2527
PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD.	*	
Defendants	*	
* * *	*	
PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD	*	
Plaintiffs	*	
vs.	*	CIVIL NO. H-01-2991
ALLFIRST BANK	*	
Defendant	*	

MEMORANDUM AND ORDER

These two civil actions are substantially identical. The parties are the same, and the legal and factual issues which have been raised are similar.

Civil No. H-01-2527 was instituted by plaintiff Allfirst Bank ("Allfirst") in this Court on August 24, 2001.

Named as defendants in this case are Progress Rail Services Corporation ("Progress Rail") and Railcar, Ltd. ("Railcar"). In its one-count complaint, plaintiff Allfirst seeks damages for breach of contract and specific performance of the contract.

Civil No. H-01-2991 was docketed in this Court on October 9, 2001, following its transfer from the Northern District of Georgia. The plaintiffs in that case are Progress Rail and Railcar and the defendant is Allfirst. That civil action was originally filed in the Superior Court of Fulton County, Georgia on August 1, 2001 and was removed by defendant Allfirst to the United States District Court for the Northern District of Georgia, Atlanta Division, on the ground that diversity jurisdiction existed. By Order entered in the case on October 2, 2001, United States District Judge Thomas W. Thrash, Jr. denied plaintiffs' motion to remand, denied defendant's motion to dismiss, and granted defendant's motion to transfer the case to this Court pursuant to 28 U.S.C. § 1404(a). In Civil No. H-01-2991, the plaintiffs are seeking a declaratory judgment and injunctive relief.

There are three motions now pending before this Court in these two cases. In Civil No. H-01-2991, Progress Rail and Railcar have filed a motion to retransfer and/or remand.[1] Progress Rail and Railcar have filed a motion to

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[1] Progress Rail and Railcar have in addition filed in the Northern District of Georgia a motion seeking certification by Judge Thrash of his ruling for immediate appeal pursuant to 28 U.S.C. § 1292(b) or in the alternative for vacation of his Order in part. They have also filed a petition for *mandamus* in the Eleventh Circuit, challenging the transfer of the case.

stay or dismiss Civil No. H-01-2527 without prejudice. Allfirst has filed in both cases a motion to consolidate. Memoranda and exhibits in support of and in opposition to these motions have been filed by the parties.

Following its review of the pleadings, memoranda and exhibits, this Court is satisfied that no hearing is necessary. *See* Local Rule 105.6. For the reasons stated herein, the motion to retransfer and/or remand filed by Progress Rail and Railcar in Civil No. H-01-2991 will be denied, the motion to stay or dismiss without prejudice filed by Progress Rail and Railcar in Civil No. H-01-2527 will be denied, and Allfirst's motion to consolidate these two cases will be granted.

I

Background Facts

Allfirst is a commercial bank with its principal place of business in Maryland.[2] In 1998, Allfirst entered into discussions with Progress Rail and Railcar concerning the financing of used rail cars owned by Progress Rail and Railcar which had been leased to various railroads. Progress Rail is an Alabama corporation with its principal place of business in that state, and Railcar is a Georgia corporation with its principal offices in Georgia.[3]

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[2] Allfirst was formerly known as The First National Bank of Maryland.

[3] Since July of 1996, Railcar has been a wholly owned subsidiary of Progress Rail.

Allfirst has had a business relationship with Progress Rail and Railcar for some 10 years. During the course of this relationship, there were a number of transactions between the parties involving the sale to Allfirst or the financing by Allfirst of railroad rolling stock which were subject to leases to third parties. On November 30, 1998, the parties entered into three different written agreements, an Assignment Agreement, a Service Agreement and a First Loss Deficiency Guarantee ("FLDG") (collectively "the Agreements"). The parties to the Assignment Agreement are Allfirst, Progress Rail and Railcar, while only Allfirst and Progress Rail are signatories to the Service Agreement. Under the FLDG, Progress Rail extended certain guarantees to Allfirst.

Pursuant to the Assignment Agreement as later amended, Progress Rail and Railcar sold 996 used railcars to Allfirst for an advance of $13,184,510 and assigned to Allfirst the leases to which these railcars were subject. Under this Agreement, Progress Rail assumed certain obligations of the lessor and was to provide various services to Allfirst. Progress Rail agreed to collect rentals under the leases, to maintain and repair the railcars, to make certain payments to Allfirst and, when a lease expired, to re-let or sell the car.

As various leases expired during the period covered by the Agreements, the railroads returned leased rail cars. According to Progress Rail, the market for leased rail cars has collapsed, and the returned cars cannot be re-leased. It is Progress Rail's position that the 1998 transaction was not a loan financing and that the repair obligation of Progress Rail is not a payment guarantee. Allfirst contends that under the Agreements, Progress Rail was

obligated to repair the cars regardless of their economic value and was further obligated to guarantee the minimum rentals agreed upon. Progress Rail in turn maintains that its liability for loss of value of the cars is limited and that it has overpaid its obligations under the FLDC.

The Agreements set forth in some detail the rights and obligations of the parties during the Agreements' terms which were to end on November 30, 2003. The many disputes which are addressed in the pleadings in these two cases arise as a result of the sharp conflict between the parties concerning the proper interpretation to be given to their contractual rights and obligations as provided in the Agreements.

II

The Motion to Retransfer

After it had removed to the Northern District of Georgia the action brought against it in a Georgia state court by Progress Rail and Railcar, Allfirst filed a motion to dismiss and a motion to transfer. Progress Rail and Railcar in turn filed a motion to remand the case to the Superior Court of Fulton County. Those motions were briefed by the parties, and their memoranda are on file here and have been reviewed by this Court. In his Order filed on October 2, 2001, Judge Thrash denied the motion to dismiss and the motion to remand and granted Allfirst's motion to transfer the case to this Court pursuant to 28 U.S.C. § 1404(a).

In their pending motion to retransfer, Progress Rail and Railcar are in effect requesting this Court to act as an

appellate court and reverse the ruling made by Judge Thrash after full briefing of the matter in his Court. On the record here, this Court is not disposed to play "jurisdictional ping-pong" and retransfer this case to the Northern District of Georgia. *See Moses v. Business Card Express, Inc.*, 929 F.2d 1131, 1137 (6th Cir. 1991).

The ruling made by Judge Thrash constitutes the law of the case. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 304 (4th Cir. 2000). Under that doctrine, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. *Arizona v. California*, 460 U.S. 605, 618 (1983). That principle is particularly applicable to decisions regarding the transfer of a case from one federal court to another. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). Were a transferee court free to revisit the transfer decision of a coordinate court, such an action would threaten to send litigants into "a vicious cycle of litigation." *Id.*

The decision to transfer a case under § 1404(a) rests in the sound discretion of the trial judge based upon a "flexible and individualized analysis" of "a number of case-specific factors." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). A transferee court should accept the ruling of the transferor court as the law of the case and should not retransfer "except under the most impelling and unusual circumstances" or if the transfer order is "manifestly erroneous." *In re Cragar Indus., Inc.*, 706 F.2d 503, 505 (5th Cir. 1983); *Repp v. Webber*, 142 F.R.D. 398, 400 (S.D.N.Y. 1992).

On the record here, this Court concludes that Progress Rail and Railcar have not met their burden of showing that Judge Thrash's transfer order is manifestly erroneous. There has been no showing that the decision of Judge Thrash was clearly incorrect as a matter of law and would result in manifest injustice unless the case was retransferred. It is not in the interest of justice for this Court to second-guess a discretionary ruling made by a judge of another district court.

Moreover, the case-specific factors in the case fully support the ruling made by Judge Thrash in granting the motion to transfer. Progress Rail and Railcar argue at some length that the so-called "first file rule" require that their action should proceed in Georgia. As a general rule, the forum where an action is first filed has priority over the forum where a subsequent action arising out of the same nucleus of facts is filed. *Cronos Containers, Ltd. v. Amazon Lines, Ltd.*, 121 F.Supp.2d 461, 465 (D. Md. 2000). However, this Court has not hesitated to conclude that a case should be transferred from the forum where it was first filed to another court when a defendant has met its burden of showing under § 1404(a) that a shift of forum is appropriate. *Roby v. General Tire & Rubber Co.*, 500 F. Supp. 480 (D. Md. 1980); *Bacon v. John Hancock Mut. Life Ins. Co.*, 317 F. Supp. 302 (D. Md. 1970).

A number of factors in the case support the transfer of this case to this Court from Georgia, the forum where it was first filed. The Agreements provide that they are to be governed by Maryland law. The FLDG contains a permissive forum selection clause whereby Progress Rail agreed that any action or proceeding relating to its guaranty "may be commenced in any state or federal court in

the State of Maryland . . . " Although it may not be dispositive, a forum selection clause is entitled to substantial consideration. *Nemo Assocs. v. Homeowners Mktg. Servs. Int'l, Inc.*, 942 F.Supp. 1025, 1028 (E.D.Pa. 1996). Even though an exclusive forum selection clause is not involved in a case, the parties' implied agreement that a particular venue would be a convenient forum favors a transfer. *Heyco, Inc. v. Heyman*, 636 F.Supp. 1545, 1550 (S.D.N.Y. 1986).

Progress Rail and Railcar contend that consideration of the convenience of the witnesses requires that Civil No. H-01-2991 be retransferred to the Northern District of Georgia. This Court must disagree. The movants' key witnesses are James B. Smallwood, President of Railcar and Senior Vice President of Progress Rail, and Eugene N. Martini, who was employed by Railcar from January 1, 1993 to January 3, 2001 and who had served as its President from July 1, 2000 to January 2, 2001. However, neither Smallwood nor Martini presently reside in Georgia. Smallwood resides in Clearwater, Florida, and Martini resides on Spring Island, South Carolina. These two key witnesses would be only slightly more inconvenienced were they required to travel to Maryland by air from their homes in Florida and South Carolina to testify at the trial than they would were the trial to be held in Atlanta, Georgia. The principal place of business of Progress Rail is located in Alabama while Allfirst and its principal witnesses are located in Maryland. Although Railcar is a Georgia corporation with its principal office in the Northern District of Georgia, Railcar is not a party to two of the documents under which the dispute in these cases arise.

Progress Rail and Railcar argue that other witnesses of theirs besides Smallwood and Martini reside in Georgia. However, Allfirst's witnesses are located in Maryland. Undoubtedly, the principal witnesses in the case will be employees of the parties, but other witnesses will presumably be called. Lessees under the leases transferred to Allfirst are all located in states other than Georgia, Alabama or Maryland. Here, on balance, the convenience of the witnesses is a neutral factor, inasmuch as various witnesses live in Georgia, in Maryland and in other states. *Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253, 1258 (4th Cir. 1991). No matter which forum is selected, "one side or the other will be burdened with bringing themselves and their witnesses from far away." *Id.*

Another significant factor supporting transfer of the case to Maryland is that Civil No. H-01-2557, the suit brought by Allfirst against Progress Rail and Railcar is pending in this Court. These two cases will now be consolidated. If Civil No. H-01-2991 were to be retransferred to Georgia and if Civil No. H-01-2557 were to remain here, the possibility of duplicative litigation and inconsistent outcomes would arise.

Progress Rail and Railcar argue that the Georgia District Court lacked the power to effect the transfer of the file to this Court as promptly as it did. However, the Order of October 2, 2001 was a valid Order of Court, and the Clerk in Georgia had every right to promptly comply and immediately transfer the file to Maryland. There is no Local Rule of the Georgia District Court prohibiting this prompt transfer. In opposing Allfirst's motion to transfer, Progress Rail and Railcar did not request a stay

of the Court's Order if the motion were to be granted, and no such stay was entered by Judge Thrash.

For all these reasons, this Court concludes that there was ample support in the record for the Order entered by Judge Thrash on October 2, 2001, transferring the case before him to this District under § 1404(a). Accordingly, the pending motion to retransfer will be denied.

III

The Motion to Remand

In their pending motion, Progress Rail and Railcar also ask this Court to remand Civil No. H-01-2991 to the Superior Court of Fulton County, Georgia. The request is an unusual one. No case has been cited by the movants and this Court knows of none which would authorize a federal court in one state to remand a case to a state court in another state.

The movants argue that a Georgia statute bars Allfirst from removing the action brought by them from a state court to the Northern District of Georgia. But, Maryland law is controlling as to the dispute between the parties here. There is no Maryland statute with provisions similar to the Georgia statute relied upon by the movants. Even if such a statute existed, it would not authorize this Court to remand this case to a state court in Georgia. Allfirst removed the case to the Northern District of Georgia pursuant to 28 U.S.C. § 1441 *et seq.* on the ground that diversity jurisdiction exists. Allfirst has fully complied with this federal statute, and state law

could not be construed to prevent a removal authorized by federal law.

For these reasons, the pending motion to remand will also be denied.

IV

The Motion to Stay or Dismiss Without Prejudice

Defendants Progress Rail and Railcar have filed in Civil No. H-01-2527 a motion to stay or dismiss without prejudice. According to the movants, Civil No. H-01-2527 is a mirror image of Civil No. H-01-2991 and should be stayed or dismissed without prejudice because the latter was the first filed case.

Since this Court has now refused to retransfer Civil No. H-01-2991, there is no reason why Civil No. H-01-2527 should be stayed or dismissed. The cases will be consolidated, and, if at a later time, grounds exist for realigning the parties or dismissing claims, this Court is empowered to take whatever action might be necessary.

Accordingly, the motion of Progress Rail and Railcar to stay or dismiss Civil No. H-01-2527 without prejudice will be denied.

V

The Motion to Consolidate

Allstate has moved to consolidate these two cases for all purposes pursuant to Rule 42(a), F.R.Civ.P. A court

may order two cases to be consolidated "[w]hen actions involving a common question of law or fact are pending before the court . . . " *Id.*

Clearly, the interests of justice support consolidation of these two cases. The parties are the same. The claims and defenses are identical, and the same three Agreements must be construed in each case. Indeed, Progress Rail and Railcar concede that Civil No. H-01-2527 is "a mirror image" of Civil No. H-01-2991. Since this Court has now declined to stay or dismiss Civil No. H-01-2527, consolidation of the two cases will foster clarity, efficiency and the avoidance of confusion and prejudice. *Arnold v. Eastern Air Lines*, 681 F.2d 186, 192-193 (4th Cir. 1982).

Accordingly, the motion to consolidate of Allfirst Bank will be granted.

VI

Conclusion

For all the reasons stated, this Court will not retransfer Civil No. H-01-2991 to the Northern District of Georgia nor will it remand that case to the Superior Court of Fulton County, Georgia. Civil No. H-01-2527 will not be stayed nor dismissed without prejudice, and the two cases will be consolidated for all purposes under Rule 42(a). Accordingly, it is this 27th day of December, 2001 by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion of Progress Rail Services Corporation and Railcar Ltd. to retransfer and/or remand Civil No. H-01-2991 is hereby denied;

2. That the motion of Progress Rail Services Corporation and Railcar Ltd. to stay or dismiss Civil No. H-01-2527 without prejudice is hereby denied;

3. That the motion of Allfirst Bank to consolidate these two cases for all purposes pursuant to Rule 42(a), F.R.Civ.P., is hereby granted; and

4. That pleadings in this consolidated action shall be captioned "H-01-2527 (Consolidated)."

/s/ Alexander Harvey II
Senior United States
District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLFIRST BANK	*	
Plaintiff	*	
vs.	*	CIVIL NO. H-01-2527 (Consolidated)
PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD.	*	
Defendants	*	

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MEMORANDUM AND ORDER

In its Memorandum and Order of December 27, 2001, this Court denied the motion of Progress Rail Services Corporation ("Progress") and Railcar, Ltd. ("Railcar") to retransfer Civil No. H-01-2991 to the Northern District of Georgia and/or remand that case to the Superior Court of Fulton County, Georgia. The Court's Order also denied the motion of Progress and Railcar to stay or dismiss Civil No. H-01-2527 without prejudice and granted the motion of Allfirst Bank to consolidate Civil No. H-01-2527 and Civil No. H-01-2991. A Scheduling Order has now been entered in this consolidated case, and the parties have been directed to proceed with discovery.

Progress and Railcar have now filed a motion to certify the Court's Order of December 27, 2001 for immediate appellate review pursuant to 28 U.S.C. § 1982(b). In

support of that motion, the movants have submitted a memorandum of law.

The Court has now had an opportunity to review the pending motion and the authorities cited. Since there is no merit to this motion, Allfirst Bank ("Allfirst") need not respond. For the reasons stated herein, the pending motion to certify of Progress and Railcar will be denied.

The case now docketed in this Court as Civil No. H-01-2991 was originally filed in the Superior Court of Fulton County, Georgia on August 1, 2001. Pursuant to 28 U.S.C. § 1441, *et seq.*, the case was removed by defendant Allfirst to the United States District Court for the Northern District of Georgia on the ground that diversity jurisdiction existed. By Order entered on October 2, 2001, United States District Judge Thomas W. Thrash, Jr. denied the motion to remand of plaintiffs Progress and Railcar, denied the motion to dismiss of defendant Allfirst, and granted Allfirst's motion to transfer the case to this Court pursuant to 28 U.S.C. § 1404(a). Civil No. H-01-2991 was docketed in this Court on October 9, 2001. Civil No. H-01-2527 had been instituted by Allfirst in this Court on August 24, 2001.

Ever since Civil No. H-01-2991 was transferred here, counsel for Progress Rail and Railcar have persisted in litigating and relitigating adverse rulings made by Judge Thrash and by this Court. They filed in the Northern District of Georgia a motion seeking certification by Judge Thrash of his Order of October 2, 2001 for immediate appeal pursuant to 28 U.S.C. § 1292(b) or in the alternative for vacation of his Order in part. They filed a petition seeking mandamus in the United States Court of

Appeals for the Eleventh Circuit, challenging the transfer of the case to this Court.[1] They filed in this Court a motion to retransfer and/or remand and also a motion to stay or dismiss Civil No. H-01-2527 without prejudice.[2] All of these efforts have been unsuccessful. Progress and Railcar nevertheless refuse to accept these adverse rulings, and they are here now asking this Court to certify its recent ruling for immediate appeal pursuant to 28 U.S.C. § 1292(b).

Quite clearly, Progress and Railcar could not at this time appeal to the Fourth Circuit this Court's Memorandum and Order of December 27, unless it were amended as required by § 1292(b). Before the Fourth Circuit may consider whether to permit an appeal from the Court's December 27 ruling, this Court must conclude (1) that the ruling "involves a controlling question of law as to which there is substantial ground for difference of opinion" and (2) that "an immediate appeal from the order may materially advance the ultimate termination of the litigation, . . . " 28 U.S.C. § 1292(b). Neither of these requirements have been met in this case.

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[1] By Order dated December 31, 2001, the Eleventh Circuit denied the petition for a writ of mandamus. *In re Progress Rail Services Corporation*, No. 01-1623-A.

[2] Progress and Railcar also previously challenged in this Court an Order entered by Judge Thrash on September 10, 2001 denying their emergency application for an Order permitting them to deposit funds into the Court registry. In its Memorandum and Order of November 1, 2001, this Court denied the motion of Progress and Railcar for reconsideration of Judge Thrash's Order.

To prevail in the interlocutory appeal now sought to be certified, Progress and Railcar must show both that Judge Thrash abused his discretion in transferring the case before him to this Court under § 1404(a) and that this Court abused its discretion in refusing to retransfer the case to the Northern District of Georgia. In its December 27 ruling, this Court concluded that Progress and Railcar had not met their burden of showing that Judge Thrash's transfer order was erroneous, of showing that his decision was clearly incorrect as a matter of law and of showing that it would result in manifest injustice unless the case was retransferred. (Slip op. at 6-7) This Court then went on to independently review in its ruling the factors supporting the transfer of the case to Maryland and, following such review, fully agreed with the determinations made by Judge Thrash. (Slip op. at 7-9). Rulings under § 1404(a) are based on case-specific factors and hardly involve controlling questions of law as to which there is a substantial ground for a difference of opinion.

Progress and Railcar continue to argue that this Court should not only retransfer this case but should also remand it to the Superior Court of Fulton County, Georgia. As this Court earlier concluded, a federal court in one state is not authorized to remand a case to a state court in another state. Neither in its earlier memoranda nor in the one now submitted have Progress and Railcar cited any case in which a federal court in one state has remanded a case before it to a state court in another state.

Moreover, this Court is satisfied that an immediate appeal from its interlocutory ruling would not advance

the ultimate termination of this litigation. These two consolidated cases were instituted some five months ago, and discovery has only recently commenced. During pretrial proceedings and thereafter, there may be many rulings of the Court which one or more of the parties may wish to challenge on appeal. The orderly way for the presentation of any one or more of the disputed issues in the case to the Fourth Circuit is to proceed to final judgment so that all questions can be presented to the appellate court by either or both sides in a single record.

Piecemeal appeals are to be discouraged because of the extra burden placed on both the courts and the litigants. *Control Data Corp. v. International Business Machine Corp.*, 421 F.2d 323, 325 (8th Cir. 1970). The Fourth Circuit has agreed with other courts' interpretation of § 1292(b) that it "should be used sparingly and thus that its requirements must be strictly construed." *Myles v. Laffitte*, 881 F.2d 125, 127 (4th Cir. 1989). Interlocutory appeals should be reserved for "exceptional cases," where such an appeal might avoid protracted litigation. *Bruce v. Martin*, 712 F.Supp. 442, 445 (S.D.N.Y. 1989). The pending case is not an exceptional one. On the record here, this Court is satisfied that the ultimate termination of this litigation would not be materially advanced by certifying this case for an appeal at this early date, before dispositive motions have been heard and before a trial has been held.

One further observation is in order. As provided by the statute, an application for an appeal under § 1292(b) shall not stay proceedings in the district court unless a district or appellate judge so orders. This Court has not and will not stay the requirements of its December 27

Scheduling Order. Counsel will be expected to fully comply with all of the provisions of that Order. Indeed, the Court has taken the time to promptly rule on the pending motion so that there will be no further delay in pretrial proceedings in this consolidated case.

For all the reasons stated, it is this 16th day of January, 2002, by the United States District Court for the District of Maryland,

ORDERED that the motion of Progress Rail Services Corporation and Railcar, Ltd. to certify the Court's Order of December 27, 2001 for immediate appellate review is hereby denied.

/s/ Alexander Harvey II
Senior United States
District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ALLFIRST BANK	*	
Plaintiff/Counter Defendant	*	CIVIL NO. H-01-2527
vs.	*	(Consolidated)
PROGRESS RAIL SERVICES CORPORATION and RAILCAR, LTD.	*	
Defendants/Counter Plaintiffs	*	

* * * oOo * * *

REVISED SCHEDULING ORDER

The Scheduling Order of December 27, 2001 is hereby revised as follows:

1. Depositions and all other discovery shall be completed by *June 21, 2002;*

2. The pretrial conference previously scheduled for June 20, 2002 is hereby canceled;

3. Motions for summary judgment or other dispositive motions must be filed by *July 12, 2002;* and

4. A final pretrial conference is hereby scheduled in this case for *Monday, July 29, 2002* at 4:00 p.m. in chambers. If a motion for summary judgment or other substantive motion has been filed, the pretrial conference will be converted into a status conference.

Except as provided herein, all other provisions of the Scheduling Order of December 27, 2001 are hereby ratified and confirmed.

/s/ Alexander Harvey II
Senior United States District Judge

DATED: April 2, 2002